Office Supreme Court, U.
FILED
JAN 19 1915
JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 141.

ELISA GALLARDO Y SEARY, *et al.*,
Appellants,

vs.

JAMES R. NOBLE, *et al.*

MEMORANDUM IN REPLY FOR APPELLANTS.

FREDERIC R. COUDERT
HOWARD THAYER KINGSBURY,
Counsel for Appellants,
2 Rector Street,
New York City.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 141.

ELISA GALLARDO y SEARY *et al.*,
Appellants,

vs.

JAMES R. NOBLE *et al.*

Memorandum in Reply for Appellants.

The brief submitted on behalf of the appellees is an ingenious attempt to disguise the complete lack of equity of their case by specious and plausible arguments directed almost entirely to subsidiary questions. The cardinal facts that the alleged lien sought to be foreclosed was created, if at all, in 1865; that the mortgagor was only a part-owner and lessee; that the debt was for money lent with which to pay *rent;* and that the alleged recognitions did not, and could not, in any event, extend the scope of the lien, are passed over almost in silence.

In order not to burden the Court with extended discussion of mere collateral questions, this mem-

orandum in reply will be confined to a brief summary of the principal reasons why the elaborate arguments of appellees' counsel are of no avail.

I.

The Statement.

The additional extracts from the Bill of Complaint, to which attention is called on pages 2 and 3 of Appellees' Brief, so far as they contain anything not included in appellants' statement, are merely allegations of law, and therefore were not admitted by the demurrer and add nothing to plaintiffs' case. The instrument in suit must stand or fall on its own terms, and on the law applicable thereto; not on the pleader's allegations as to its legal effect. In like manner the allegation that Gallardo "was required to recognize" the alleged lien, and that it was so recognized, "as appears duly noted in said register", cannot extend the legal effect of what was actually done, or substitute the pleader's theory for the proper legal conclusion from the facts.

II.

The nature and effect of the instrument in suit.

A. Appellees' counsel apparently misapprehended appellants' arguments on this point, which are:—

First, that the instrument in suit created a lien merely on the crops; and

Second, that, *in any event*, it did not and could not bind the title of co-owners.

The second contention is not, as suggested in Appellees' Brief at page 6, an inference or conclusion from the first; it is separate and independent. On its face, the instrument created a specific lien on the crops only, and bound the whole property of the debtor only as any debt may do. But assuming for the purposes of the argument that, in spite of the provisions of the Spanish law which apparently prevented *express* general mortgages, this general obligation was operative as a lien on real property, *nevertheless*, it could only bind the real property which belonged to the debtor, and did not and could not affect his co-owners.

B. Appellees' argument that the recital of the instrument in suit in the Registrar's list of encumbrances when Gallardo took title to the plantation estops Gallardo and his heirs (the appellants) to deny that it bound the *whole* plantation is an unwarranted inference from a purely conjectural premise. Appellees say that Gallardo *must* have included a recognition of this alleged lien when "he requested the inscription of his possessory title" (Appellees' Brief p. 23), but the Registrar's certificate does not show that he did so (Rec. p. 15), and the allegation of the Bill (Rec. p. 2) is too vague and argumentative to serve as the basis for any adjudication on this point.

Even assuming for the purposes of the argument that Gallardo did, in some way, expressly

take the property subject to whatever lien was created by this instrument, this would not extend the lien to cover any *other* property, or any *greater interest* in the property, that it covered by its own terms. If it covered the crops, then Gallardo, on this assumption, would have taken the property subject to a lien on the crops; if it covered the original debtor's undivided interest in the plantation, then Gallardo would have taken the plantation subject to such lien *on the undivided interest*. In no event could the mere recital or recognition of a lien extend its scope.

C. Appellees argue, under their Point II, that the instrument was a *refaccion* contract, and imposed a tacit mortgage upon the plantation as a whole (Appellees' Brief, p. 25). Their argument as to the effect of a *refaccion* contract reduces itself to this; that, where real estate has been *benefited* by the money lent, the creditor has a tacit lien thereon even if the loan was not made to the owner of the property (Appellees' Brief, p. 29). Even if this be true, it is wholly irrelevant here. The money lent by Noble to Gandia did not benefit the real estate, but merely benefited Gandia personally as lessee. The Bill alleges that the money was lent "for the support and *refaccion* of the plantation" (Rec. p. 1), but the instrument itself, which is annexed to the Bill, and is necessarily controlling, recites that the money was lent "for the payment of the lease" (Rec. p. 4). Had the money not been lent, Gandia might have lost his leasehold; but it does not follow that the plantation would have suffered, for the other owners might have been able to conduct it profitably, as

they have apparently done since one of them (Gallardo) took it over.

The reason for the tacit lien afforded by *refaccion* contracts thus wholly fails in this case, and it becomes evident that the payment of rent is not a "similar thing" to the repair of a house (Appellees' Brief, p. 28), and that such payment did not "benefit" anything but Gandia's leasehold. None of the decisions cited by Appellees on this question holds that the loan of money with which to pay rent gives rise to a *refaccion* lien, and their reasoning, far from supporting such a proposition, is wholly inconsistent with it.

III.

The Defense of Prescription.

It must be remembered that this claim is of the stalest—over forty years old when the Bill was filed. All the equities and all the presumptions are against it, and all doubtful questions should be resolved adversely to it. As suggested in Appellants' Brief (p. 15), this case should not be decided here on technical refinements of equity pleading, especially as it comes from a jurisdiction in which, as previously pointed out by this Court in this very case (223 U. S. at p. 66), equity procedure is a novelty.

The arguments of appellees,

(a) that the defendants' plea was "duplicitous" because several different periods of limitation were pleaded together (Appellees' Brief, p. 32);

(b) that the plea did not specifically mention the statute which the appellees deem applicable (Appellees' Brief, p. 35); and

(c) that the demurrer was unavailing because coupled with a plea (Appellees' Brief, p. 48); may be dismissed with very brief comment.

The defendants clearly pleaded the thirty year period of limitation. This necessarily included all the shorter periods and their specific mention could prejudice no one. The essential fact pleaded was the lapse of time; the reference to specific statutes was surplusage, and therefore immaterial even if erroneous. No objection seems to have been made in the Trial Court to the coupling of the demurrer and plea, and such an objection now is too late and too technical.

On the record as it stood in the Trial Court, it was apparent that the alleged lien sought to be foreclosed did not in any event cover the whole plantation, and for this reason, if for no other, the demurrer should have been sustained. In addition to this, it also appeared from the pleadings that the alleged cause of action was barred by limitation, unless the recognitions, adumbrated but not explicitly pleaded in the Bill, were sufficient to toll the statute. On this question, either the plea should have been sustained, or the plaintiffs required to give proof of the facts. In either case, the decree of foreclosure and sale of the *whole* plantation was erroneous.

IV.

The Procedure Below.

On the questions of procedure discussed by appellees, mainly under their Point IV, appellants are willing to rest on their principal Brief. These questions are merely ancillary to the basic questions already discussed. They were presented in the main brief principally to show that not only had the Trial Court made an erroneous decision, but that it had rejected every opportunity to ascertain and determine the real merits of the cause, and also that the plaintiffs' case was as lacking in technical pre-requisites as it was barren of substantial equity.

There is nothing in the Record to suggest that any evidence was taken in the Trial Court before the entry of the decree, or that the so-called "findings" are based on anything but the Bill. The cases cited by appellees on page 18 and 19 of their Brief were none of them on *pro confesso* decrees, and it is manifest that in the present case this Court can look only to the pleadings and cannot assume that there was any evidence additional thereto. The defendants were heard "as to the *form*" of the decree (Rec., p. 24; Appellees' Brief, p. 17), but there is nothing on which to base even an inference that any proofs were taken to supplement the insufficient allegations of the Bill. The fact that the decree goes beyond these allegations is one of the errors of which appellants complain.

So far as Judge Hamilton's opinion on the Goenaga intervention is concerned, it may be left to speak for itself, not as controlling in this Court, but as the latest expression of the Court whose

decree is here under review, contained in a carefully reasoned opinion, and not in a mere unexplained decision.

CONCLUSION.

The appellees' arguments do not sustain the decree appealed from and it should be reversed.

Respectfully submitted this 18th day of January, 1915.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for Appellants,
No. 2 Rector Street,
New York City.

FILED
JAN 9 1915
JAMES D. MAHER
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 141

ELISA GALLARDO Y SEARY ET AL., APPELLANTS,

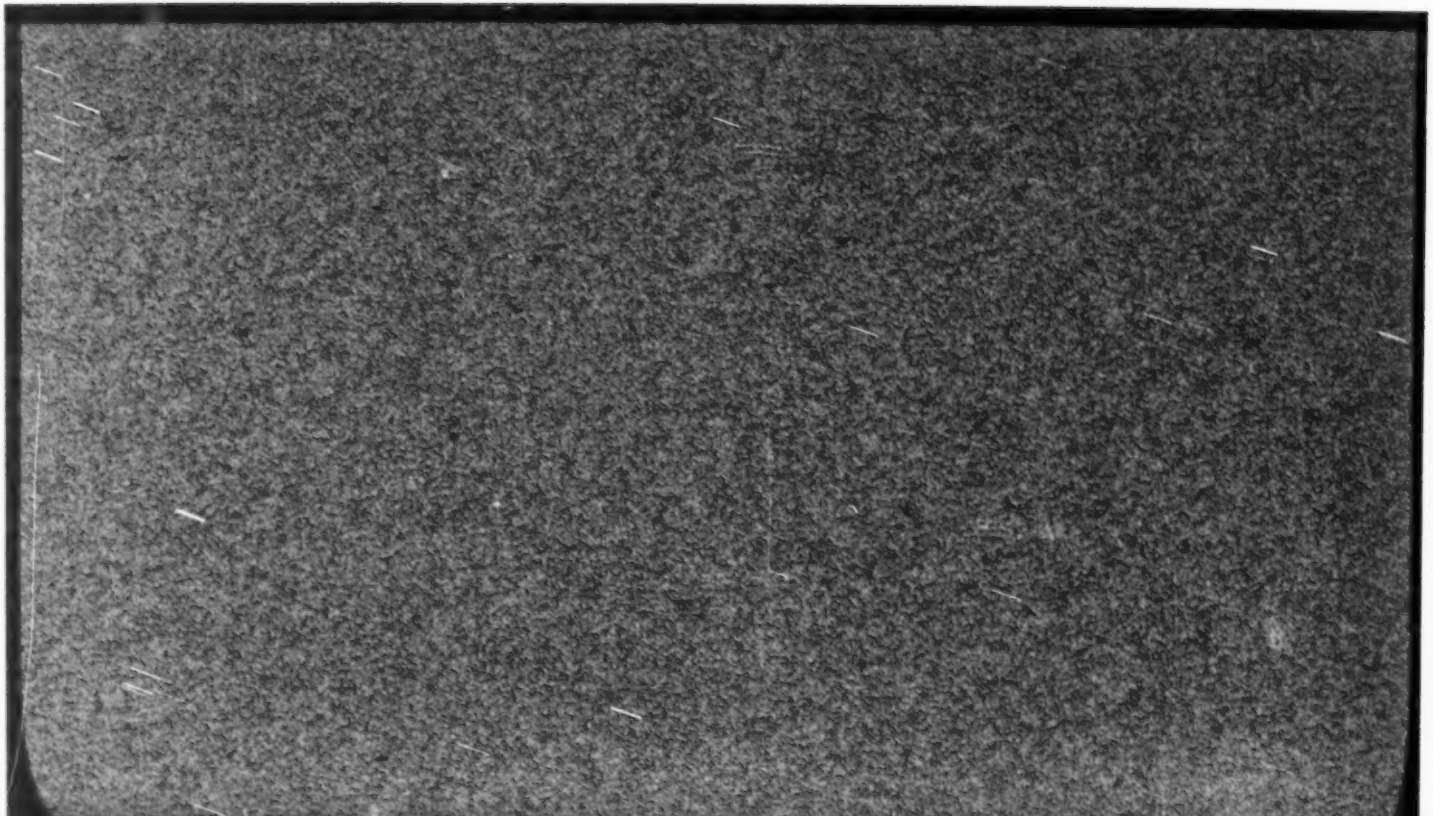
vs.

JAMES R. NOBLE ET AL.

APPEAL FROM UNITED STATES DISTRICT COURT FOR PORTO RICO.

BRIEF FOR APPELLEES.

ROBERTO H. TODD,
N. B. K. PETTINGILL,
Counsel for Appellees.



INDEX.

	Page
Statement	1
Argument	6
POINT I.	
(*a*) Instrument created lien on land	7
Rule that mortgages must be upon specific real estate confined to effect upon rights of third parties	10
Laws especially governing rights under this instrument	13
(*b*) Instrument bound the title of Gallardo	14
Sufficiency of allegations of bill	15
Upon decree *pro confesso* question is of substance, not form	16
Allegations supported by findings of fact	17
In absence of evidence in records conclusive presumption that decree was warranted	18
Only open question sufficiency of findings to support decree	19
(*c*) Appellants estopped to deny lien	19
Because of conduct in obtaining possessory title	20
Extracts from statutes	21
Presumption that public officials properly perform duties	23
Statement of principle	24
POINT II.	
Instrument imposed a tacit mortgage	25
Described as deed of refaccion	26
Definition of refaccion	27
Illustrations	28
POINT III.	
Defense of prescription not sustained	31
Prescription, if not pleaded, waived	31
Plea bad because double	32

Page

Also because stating no defense 33
Also because thirty-year statute not pleaded 34
Prescription a rule of real property 34
Reply to opposing argument 35

POINT IV.

(1) Complainants entitled to remedy pursued 37
Summary proceedings optional 38
Record of mortgage need be transferred only as against "third persons" 38
Appellants not "third persons" 38
Registrar's ruling not binding 40
But, if so, result favorable to appellees 40
(2) Refusal to open *pro confesso* not abuse of discretion 41
1. Records did not prove recognitions insufficient 41
The first registrar's certificate 41
Misprint in record on page 15 42
The second registrar's certificate 43
The acquittance 44
Authorities showing sufficiency 45
2. No sufficient defense presented to the court below. 46
Answer presented not signed by defendants ... 47

ADDENDA.

Failure to answer within time not excused 48
Suspension of entry of decree a matter of discretion 50
Record not in condition to review its exercise 51
Comments on Judge Hamilton's opinion 51
1. That opinion held the contract was one of refaccion ... 52
2. And that it gave a tacit lien upon the realty 53
3. It erroneously held that the lien bound only the interest of Gandia 53
4. And that it was barred by prescription 54
Course of conduct of Gallardo ignored 55
Difference in state of records as to the defense of prescription 55
And as to Gandia's ownership 56
Résumé 56

APPENDIX.

Translation of circular of the Governor General and of the Royal Cedula of April 11, 1852, approving same 59

LIST OF LEGAL CITATIONS.

	Page
From the Supreme Court of the United States:	
Burnett *vs.* Desmornes, 226 U. S., 145	31
Cent. R. Co. *vs.* Cent. Trust Co., 133 U. S., 83	**14, 16**
Chavez de Armijo *vs.* Armijo, 181 U. S., 484	19
Collier *vs.* United States, 173 U. S., 79	18
Crowe *vs.* Trickey, 204 U. S., 228	17
Dupre *vs.* Mansur, 214 U. S., 161	34
Farley *vs.* Kitsin, 120 U. S., 303	33, 36, 48
Gaines *vs.* Chew, 2 How., 619	37
Garzot *vs.* Rios de Rubio, 209 U. S., 283	19
Gonzalez *vs.* Buist, 224 U. S., 126	19
Hughes *vs.* Edwards, 9 Wheat., 489	45
Jerome *vs.* McCarter, 94 U. S., 734	24
Jones *vs.* Meehan, 175 U. S., 1	54
Keller *vs.* Ashford, 133 U. S., 610	15, 24
Lawson *vs.* U. S. Mining Co., 207 U. S., 11	**17**
Marshall *vs.* Burtis, 172 U. S., 630	19
Mercantile Bank *vs.* Carpenter, 101 U. S., 567	36
Ortega *vs.* Lara, 202 U. S., 339	37
Patterson *vs.* de la Ronde, 8 Wall., 292	39
Phila., etc., R. Co. *vs.* Howard, 13 How., 307	23
Putnam *vs.* Day, 22 Wall., 60	17
Rijos Cordova *vs.* Folgueras, 227 U. S., 375	34
Romeu *vs.* Todd, 206 U. S., 358	34
St. Louis *vs.* Knapp Co., 104 U. S., 658	15
Sanger *vs.* Nitingale, 122 U. S., 176	31
Shields *vs.* Schiff, 124 U. S., 351	31
Smythe *vs.* Ames, 169 U. S., 466	37
Torres Zayas *vs.* Lothrop, 231 U. S., 171	18, 24
Zimmerman *vs.* Harding, 227 U. S., 489	18
Swann *vs.* Fabyan, 110 U. S., 590	24
From the Supreme Court of Porto Rico:	
Altuna *vs.* Ortiz, 12 P. R., 318	45
Banco de P. R. *vs.* Font, 14 P. R., 561	31
Batista *vs.* Taboas, 15 P. R., 382	10, 38
Carmona *vs.* Cuesta, 18 P. R., 178	39
Cuebas *vs.* Territorial Bk., 19 P. R., 1109	39
Del Moral *vs.* Registrar, 20 P. R., 391	38
Diaz Caneja *vs.* Registrar, 5 P. R., 175	39
Fernandez *vs.* Gutierrez, 10 P. R., 59	24
Fernandez *vs.* Registrar, 17 P. R., 1021	40
Finlay *vs.* Finlay, etc., Co., 8 P. R., 371	24

Page

Gimenez *vs.* Brenes, 10 P. R., 124 38
Hernandez *vs.* Cuebas, 16 P. R., 519 ..... 38, 39
Hernandez *vs.* Fernandez, 17 P. R., 111 38
Inchausti *vs.* Registrar, 17 P. R., 566 23
Lopez *vs.* Registrar, 15 P. R., 712 23
Martinez *vs.* Registrar, 18 P. R., 488 40
Navarez *vs.* Registrar, 10 P. R., 236 38
Pellicier *vs.* Fernandez, 19 P. R., 111 24
Prado *vs.* Estate of Rio, 15 P. R., 489 ..... 24, 45
Ramirez *vs.* Registrar, 16 P. R., 630 40
Suc. of Firpo *vs.* Suc. of Pino, 14 P. R., 100 ..... 34, 38, 45
Suris Cardona *vs.* Quiñones, 17 P. R., 614 39
Torres *vs.* Lothrop, Luce & Co., 16 P. R., 172 24
Valdez *vs.* del Valle, 1 P. R., 75 ..... 20, 39
Vilella *vs.* Vilella, 18 P. R., 214 27

From the Supreme Court of Spain:

18 Juris. Civil, 134 28
18 Juris. Civil, 570 29
18 Juris. Civil, 612 29
24 Juris. Civil, 369 45
30 Juris. Civil, 569 45
60 Juris. Civil, 231 20
63 Juris. Civil, 837 ..... 29, 53
64 Juris. Civil, 256 ..... 34, 45
65 Juris. Civil, 725 28
71 Juris. Civil, 99 39
73 Juris. Civil, 45 45
76 Juris. Civil, 196 28
79 Juris. Civil, 252 39
80 Juris. Civil, 907 ..... 40, 44
87 Juris. Civil, 402 39
91 Juris. Civil, 107 34
95 Juris. Civil, 773 39
95 Juris. Civil, 777 20
100 Juris. Civil, 679 39

From the Inferior Federal Courts:

Duponti *vs.* Mussy, 4 Wash., 128 35
McCloskey *vs.* Barr, 38 Fed. R., 165 32
Mason *vs.* H., P. & F. R. Co., 10 Fed. R., 334 35
Sharon *vs.* Hill, 22 Fed. R., 28 33
Stearns *vs.* Page, 1 Story, 204 33

Miscellaneous Citations: Page

Escriche, Diccionario de Legislacion..... 10, 11, 25, 26, 27
Bates' Federal Equity Practice..... 48
Foster's Federal Practice..... 33, 36
Jones on Mortgages..... 31, 45
Story's Equity Pleading..... 48
Barned *vs.* Barned, 21 N. J. Law, 245..... 45
Benson *vs.* Jones, 1 Tenn. Ch., 498..... 32
Broce *vs.* Broce, 4 Phillip., 611..... 24
Cook *vs.* Parham, 63 Ala., 456..... 45
Kellog *vs.* Dickenson, 147 Mass., 432..... 45
Moore *vs.* Clark, 40 N. J. Eq., 152..... 45
Palmer *vs.* Butler, 36 Iowa, 576..... 45
Saltus *vs.* Tobias, 7 John. Ch., 214..... 32
Wellington *vs.* Jackson, 121 Mass., 159..... 24

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 141.

ELISA GALLARDO Y SEARY ET AL., APPELLANTS,

vs.

JAMES R. NOBLE ET AL.

APPEAL FROM UNITED STATES DISTRICT COURT FOR PORTO RICO.

BRIEF FOR APPELLEES.

Statement.

This is the second appearance of this case in this court. The first result below was a decree dismissing the bill of complaint, entered in July, 1909, on the ground that complainants were barred by laches. From that decree the present appellees (including their mother, since dead), appealed to this court and secured a reversal with a direction that the

cause be "remitted to the district court for further consideration." Such further consideration resulted in a final decree of foreclosure for the complainants, from which the defendants below (former appellees) are now appellants.

So far as the *statement* introductory to the brief now on file for the appellants is confined to *facts*, we accept it as correct, except for certain omissions which might lead to incorrect inferences unless supplied. So far as it expresses opinions and deductions, their correctness can best be tested by the strength or weakness of the argument supporting them and, of course, is not accepted by us. To supplement the *statement* made in the brief for appellants we call attention to the following particulars from the record:

(1) Connected with the allegations of the bill as to the character of the instrument upon which it is founded, as summarized on page 2 of their brief, is the further allegation that (Record, page 1, bot.)—

> "the said provision contained in said deed providing for its registry in the then existing book of mortgages was made in pursuance of the law then in force in Porto Rico to the effect that such indebtedness should be liquidated as to its amount by public document which might, when so liquidated, be recorded, and should thereupon become a lien upon the land therein described and against which it was so recorded; and that, in pursuance of said law, the said deed was so recorded in the old 'Anotaduria' in"

a specified book. Thus it is alleged, contrary to the intimation of their *statement*, that the lien covered the land itself, otherwise it could not properly have been recorded in the "Anotaduria."

(2) Where the *statement*, near the bottom of page 2, purports to summarize the allegations of the bill touching the ownership of the property and the recognition of the debt by the ancestor of appellants, such summary is quite deficient. The language of the bill in that regard is that (page 2, middle)—

> "upon a settlement of the bankrupt estate, the above mentioned Ricardo Gallardo, one of the co-owners in said plantation with said Ruiz (the bankrupt), acquired title thereto, but subject to various liens in favor of different persons, and among them the lien of said William Noble as hereinbefore set forth; that thereafter said Gallardo obtained from the proper court a possessory title as owner of said plantation, and, upon applying for the registry of said title in the year 1882, he was required to recognize as valid liens, and agree to pay, all such liens as appeared against said plantation upon the books of the old registry, among which was the lien hereinbefore described; and that the validity and existence of said indebtedness and its lien upon said plantation was so recognized by said Gallardo, as appears duly noted in said registry," etc.;

and that (page 3)—

> "in the year 1883, and during the lifetime of said Ricardo Gallardo, the latter executed a further notarial instrument wherein he recognized the validity and existence of the said indebtedness hereinbefore described and of the lien thereof upon said plantation; and that by said repeated recognition of the same the running of the statute of prescription has been interrupted," etc.

Thus it is alleged not only that Gallardo "acquired title," but also how he acquired it; that the whole property *as acquired by him* was *subject to* this lien now foreclosed; and that he had recognized the lien as against his title and the validity and existence of the indebtedness underlying it. Hence, the propriety of the decree as against the whole property.

(3) Near the bottom of page 3 of their brief it is stated that "defendants' counsel applied informally to Judge Charlton for an extension of time" to file an answer, and that "no action was then taken." Although a reference is made to the page of the record supposed to support it, such a gen-

eral statement may unintentionally mislead. If the cited portion of the record be perused it will be seen to be a paragraph of the affidavit made by counsel then representing appellants wherein the facts stated fall far short of constituting any sufficient application whatever, informal or otherwise. It shows merely a conversational suggestion to the judge of a *desire to apply*, without the filing of any paper, without any attempt to give notice even of such desire to opposing counsel, without an intimation that any knowledge of such desire, or of the making of such oral suggestion, ever reached opposing counsel, and without intimation that the affiant ever gave the matter further attention or effort. To the contrary, he states that "having brought to the attention of the court the fact that he desired an extension of said time to answer (he) felt as if no formal petition was necessary to attain the said end." Hence the fair statement would be not that "no action was then taken," but that *no action was ever asked.*

(4) At the bottom of page 3 of their *statement* the date of the entry of the order *pro confesso* is correctly given as July 11, 1912, followed by the statement that "thereafter an application was made by defendants to set aside this order," etc. It is but fair for the court to bear in mind in this connection that *about four months* had elapsed, that is, from July 11 to November 8, before any application to open the *pro confesso* was even filed in the clerk's office.

It is also stated (page 4) that "an affidavit of merits and a proposed answer were submitted," which is correct with an omission to state the time—the affidavit of merits was submitted with the application, the proposed answer not until the hearing. A further inaccuracy includes the document entitled "Acquittance" (page 17) as among those "claimed to constitute the recognitions of the mortgage." While we think it does, in fact, contain a recognition of the instrument in suit as a mortgage binding the land in the hands of Gallardo, there is nothing in the record indicat-

ing that it was offered on behalf of the complainants; on the contrary, it was *produced by the defendants* as proof of the averment made in their affidavit of merits that the Noble debt *had been paid* (page 11, bottom).

Of course, that averment was made under a misapprehension by counsel of the import of that instrument (doubtless because of the similarity in the amounts of the two debts), and after the mistake was discovered it was admitted in their proposed answer, tendered three weeks later, that "they have no information whatever as to whether or not the said Ruiz Gandia ever paid the said Noble the said sum or any part thereof," and that "respondents are not in a position to answer and allege whether Noble's indebtedness and claim against Ruiz Gandia was ever proved, allowed and paid by the trustees of the latter's estate" (page 21, par. VI).

(5) In the last paragraph of said *statement,* on page 4, allusion is made to a discrepancy between different provisions of the final decree as to the amount adjudged to be due and a larger amount mentioned in the subsequent paragraph directing the sale of the property in case of non-payment of the debt. The amount due is first definitely adjudged to be the principal debt of $8,093 together with $14,540 as "interest thereon at the legal rate of six per centum per annum from the first day of January, 1883, the date of acknowledgment by Gallardo" (page 25). The larger amount will be found to be the equivalent of the same principal with interest from the time the debt fell due, or January, 1867; but the court below held that Gallardo and his heirs should be required to pay interest only from the date of his recognition of the debt. The larger amount was left in that particular paragraph of the decree by mistake and may simply be regarded as surplusage, as it is not the paragraph fixing and adjudging the amount to be paid.

(6) Allusion is also made on page 4 of their *statement* to the "able opinion" of Judge Hamilton subsequently rendered upon the intervention of the Goenaga Succession under another similar mortgage, as though it were thereby established that Judge Hamilton was right and Judge Charlton wrong. We know of no presumption against or in favor of one judge over another when sitting in the same court. Both decrees were subject to appeal and both have been in fact appealed from, the appeal of the Goenagas from Judge Hamilton's recent decision being now docketed in this court under No. 749. It has been said that the weakness of judges is in the writing of opinions, and we hope to demonstrate from this opinion itself as the final point of this brief that his reasoning should have resulted in a decree for the complainants, and would have done so but for one error of law.

ARGUMENT.

Relying upon the well-settled practice of this court that errors assigned but not insisted upon and supported by argument are considered as abandoned, we will content ourselves with answering in order the points made by counsel for appellants, with such subdivisions as may aid to greater clarity, and then commenting briefly upon Judge Hamilton's later decision on the intervention, upon which so much stress is laid.

POINT I.

This point, as stated for appellants, contains two distinct propositions: (1) That the instrument in suit created a lien merely on the crops, not on the real estate, and (2) that therefore it did not bind the title of co-owners. It may be admitted without hesitation that, conceded the first proposition, the second necessarily follows, *unless* the appellants are prevented from so claiming by estoppel or by recognition

of the lien. Certainly a lien upon crops *alone* is not a lien upon the land and binds the *title* of nobody in the absence of such estoppel or recognition.

While we controvert both the above contentions, their allowance would not necessarily result in a reversal of the decree below. For, even had the lien of the contract not bound the interest of Ricardo Gallardo as a co-owner at the time it was made, it might still bind his interest *as sole owner* by virtue of subsequent purchase and acquisition of an independent title subject to it. We therefore rest our denial of the validity of the conclusions reached by appellants in their point I upon three propositions:

(*a*) The instrument *did* create in law a lien on the land.

(*b*) That lien *did* affect the title of Gallardo.

(*c*) Whether so or not, appellants will not be permitted to deny it.

(*a*) *The instrument in suit did create in law a lien on the land.*

To support the contrary contention opposing counsel have quoted the instrument verbatim in their brief, indicating by italics certain portions deemed most material to their contention. Without a verbatim repetition we desire here to indicate certain other provisions material to *our* contentions:

(1) One purpose of the instrument is recited to be to *evidence a liquidation* of an indebtedness previously agreed upon.

(2) Another purpose is recited to be "to carry into effect this agreement in the way and form more suitable in law."

(3) There is a recital of a previous liquidation between Ruiz and one Goenaga, evidencing an indebtedness on

which 1,000 pesos remain due, which "must be paid during the month of October of next year, 1886, thereby being canceled *that deed of refaccion,* and Ruiz obliged not to execute any other agreement or deed with damage to *this present one,*" etc., meaning, we think, that this one also was a deed of *refaccion.*

(4) It is further stated that another purpose of the instrument is for the *better* security of the debt. Therefore, *besides* the special obligation of the plantation described, he thereby creates a general mortgage upon all his property and *expressly* mortgages the *crops.* Thus it is clearly indicated that one species of "security" for the debt already existed under the law, in the special obligation of the plantation—that being a *tacit* mortgage implied by law from the character of the indebtedness, as will be hereinafter explained; and that he desired, in addition thereto, to impose a general mortgage upon all his property and an express obligation upon the future crops. Thus is effect given to each phrase of the instrument.

(5) The evident intention of the parties and the character of the instrument as above explained are further carried into effect by a provision at the close that "the opportune annotation be taken of this instrument by the register of mortgages of this district, within the legal time of thirty days," etc.

It is evident from a mere perusal that the translation of this instrument whose meaning is in controversy is not entirely smooth or skilful, and in the paragraph referred to in (4) *supra* its faults go so far as to affect its clearness and intelligibility. The transcript was prepared under the instructions of counsel for the appellants, without any notice to counsel for appellees as at the time required by the new rules (Record, page 35). It would have been much better had the Spanish of the original been included as well as the

translation, and we think it an excusable liberty to quote here the original of that particular paragraph, which is as follows:

> "Para mayor seguridad de lo expuesto, y sin que la obligación general que hace de todos sus bienes impide la especial ni por el contrario ésta a aquella, el compareciente don Ramón Ruiz, hipoteca, expresa y señaladamente no tan sólo los frutos que en la proxima cosecha elabore la Hacienda Casique, radicada en la jurisdicción de Loiza, como ya queda precisado, sino tambien los que fabrique en los demás cosechas venideras hasta el completo pago de la cantidad que deja reconocida; permitiendo que de este instrumento se tome la oportuna razón por el anotador del ramo de Hipoteca de este Distrito, dentro del término legal de treinta dias, de la cual obligación y sus efectos fueron advertidas las partes por mí el Escribano=Al cumplimiento de cuanto queda escriturado obliga el compareciente sus bienes presentes y futuros con la cláusula guarantigia, contrato ejecutorio, sumision y renuncia de leyes, fueros y derechos á su favor, con la que prohiba la general en forma.="

This original serves to make plain two things which, perhaps, may be clearly enough inferred from the imperfect translation: first, that a negative is to be supplied in the translation of the earlier clause referring to the general obligation, the meaning being that the general obligation of all his property and the special obligation over that described in the instrument were both recognized as existing and enforceable, without either one of them obstructing the application of the other, and, second, that those two obligations, one general, the other special, were to be additional to the express obligation thereby laid upon the crops.

Near the bottom of page 10 of their brief counsel refer to what could or could not be mortgaged under the mortgage law of 1869, but that matter can be in no way pertinent to the present question because the execution and record of

this mortgage took place prior to that date, *i. e.*, in 1865. Nor are counsel entirely right in the statement made in the same connection, near the top of page 11, that "the earlier law * * * proceeds upon the assumption that mortgages can be made only of specific real property." Were this contention correct it would affect the validity as a mortgage lien of only two of the classes of obligations referred to in the instrument: the "general obligation of all property" and the lien on crops, and leave untouched the third, the tacit obligation upon the particular plantation described.

To be at all correct, however, such a statement must be confined to the *recording* laws, and even then it could apply only as affecting the rights of those to whom those laws gave the name of "terceros" (third parties), which substantially corresponds to the *innocent purchaser* of the American law (Batista *vs.* Taboas, 15 P. R., 382).

Escriche, whom we believe to be one of the standard commentators upon the Spanish law, states the effect of the recording laws in his "Diccionario de Legislacion," as follows:

> "Que esta ley ha introducido en nuestro sistema hipotecario la *especialidad* y la *publicidad;* es decir, que la voluntad de la ley, es que no se quedan perseguir, por el acreedor las cosas que le estan hipotecadas por contrato, a lo menos en caso de perjucio de un tercer poscedor, sino cuando la hipoteca recae especialmente sobre una, dos o mas cosas determinadas, y se hizo ademas notoria por medio del registro de modo que pudiera enterarse de su existencia la persona que tratando de celebrar algun contrato con el dueno tuviese interes en conocerla.
>
> "Hipoteca," par. XXIII (4).

(*Translation.*)

That this law has introduced into our system of mortgages particularity and publicity, that is to say, that the purpose of the law is that the creditor cannot pursue the things which are mortgaged to him by con-

tract, *at least to the prejudice of a third possessor,* except when the mortgage specially burdens one, two or more specified things, and moreover is made notorious by means of the Registry, so that its existence may be known to the persons who, seeking to enter into any contract with the owner, might be interested in knowing it.

And, again, in explaining the limitation of the principle that the mortgage affects the mortgaged property in whatever hands it may be found, he says:

"Esta regla tiene lugar en la hipoteca especial, ora sea legal, ora convencional, como igualmente en la hipoteca *general* cuando es legal; * * *

"Mas en la hipoteca general constituida por convención, no puede perseguirse ninguna de las cosas hipotecadas que hubieren pasado á terceras manos, según lo dicho en el num. XXIII de este mismo artículo con arreglo á la ley 3, tit. 16, lib. 10, Nov. Rec."

Id., par. XXXV.

(*Translation.*)

This principle has application to the special mortgage, whether it be created by law or by contract, as likewise to the general mortgage when it is created by law; * * * But in case of a general mortgage created by contract none of the things mortgaged can be pursued *which may have passed into third hands,* according to what has been said in par. XXIII of this same article pursuant to law 3, title 16, book 10, of the Novisima Recopilacion.

Escriche, therein following many decisions of the courts, also recognizes the continued existence and validity of the *general* mortgage (subject, of course, to the above limitations) in the following paragraph:

"Las calificaciones de hipoteca general y especial pueden aplícarse á toda clase de hipotecas, esto es,

á la hipoteca legal, á la judicial y á la convencional. La hipoteca legal ó tacita es con efecto unas veces general y comprende toda clase de bienes, asi muebles como raices, derechos y acciones, como por ejemplo la que tiene la mujer en los bienes de su marido * * * ; y otras veces es particular ó especial, cuando están señalados por la ley bienes determinados sobre que debe recaer, como por ejemplo la que tiene el prestamista en la casa ó nave reparada con el dinero prestado," etc.

Id., par. XXIV.

(*Translation.*)

The division of mortgages into general and special can be applied to all kinds of mortgages, that is, to the legal mortgage, to the judicial mortgage and to the contractual mortgage. The legal or tacit mortgage is really sometimes general and includes all kinds of property, personal as well as real, rights and choses in action, as, for example, that which the wife possesses in the property of her husband * * * ; and at other times it is particular or special, when the law points out specific property upon which it must fall, as, for example, that which the lender possesses upon the house or ship repaired with the money loaned.

We may, therefore, conclude, unless the authority of Escriche be questioned, that mortgages, whether tacit, that is, created by the law alone, or express, that is, created by contract of the parties, may still be either general or special, according to the logic of the circumstances, with the limitation that, when general, the rights conferred by them would not affect "third parties" who might have acquired an interest. Or, in other words, as applied to the present case, the general mortgage expressly given in the instrument in question was valid as against the interest of Ruiz in San José Cacique and the tacit legal mortgage was also valid, provided the character of the indebtedness was such as to create one—*unless* Gallardo or his descendants occupy the privileged posi-

tion of "third persons" under the law, a matter which will be discussed later. Indeed, the existence of the tacit special mortgage, under proper conditions, is admitted by counsel for appellants on page 12 of their brief.

In order clearly to appreciate the state of the laws under which the instrument in question was drawn special reference should be had to the law governing the old "Anotadurias" and to a circular of the Governor General of Porto Rico, dated November 10, 1848, and confirmed by a Royal Cedula of April 11, 1852, referring to loans for sugar plantations. The former will be found in the Novisima Recopilacion, book X, title 16, laws 2, 3, and 4, which were somewhat modified by a Royal Order of May 23, 1845. The circular and cedula referred to will be found in vol. 4 of San Pedro's Compilacion of the Laws of Ultramar, on pages 614 and 625, and we append hereto a translation of the same.

It will be observed that in the law governing Anotadurias there was no provision for the recording of crop mortgages, nor of anything but interests in realty, described as—

> "imposiciones, ventas y redenciones de censos ó tributos, ventas de bienes raices, ó considerados por tales, que constare estar gravados con alguna carga, fianzas en que se hipotecaren especialmente tales bienes, escrituras de mayorazgos ùoobra pia" (law 3, par. 1),

which conforms to the statement of counsel for appellants on page 11 of their brief. It will also be observed that the instrument provides for its recording in the place and within the exact time required by that law, and that it contains the waiver and renouncement of rights provided for in the Royal Cedula of 1852 and was evidently drawn in an attempt to come within it. From these features we think it may be conclusively deduced that a mortgage of the crops was not its only effect, but that the parties intended to mortgage the realty and *thought* they were doing so—as we believe they did in law.

To sum up: we submit that the parties intended to describe in this instrument three kinds of lien, the tacit lien given by the law under contracts of refaccion, the express general lien upon all Ruiz' property, and the express special lien on the crops. The first existed, if at all, independently of this instrument. The second was created by the instrument and was valid between the parties so far, at least, as Ruiz' title was concerned and also affected subsequent acquirers of that title to this particular property because this property was described in it and the record was made against it in the Anotaduria. The third is no longer of importance. Our right to claim under the first and second will be supported by the argument to follow.

(*b*) *The instrument in suit, affecting the land, also bound the title of Gallardo.*

We thus narrow the statement of the proposition because, if Gallardo and his heirs be bound, what may have resulted as to other co-owners need not concern us.

The argument to sustain the contrary, found on pages 11 and 12 of appellants' brief, rests largely upon the alleged insufficiency of the allegations of our bill; and, indeed, we think it must rest entirely upon that, because, if the allegations be sufficient, the decree entered upon those allegations taken *pro confesso* is conclusively presumed to have been founded upon proofs sufficient properly to support them and to warrant the decree as entered.

Central R. Co. *vs.* Central T. Co., 133 U. S. (cited by appellants).

We propose, then, to examine the allegations of the bill upon this matter. True it is that Ruiz is alleged to have been at the time of the execution of the instrument only a part owner of the plantation and lessee of the shares of his co-owners, and counsel insists that the further allegation

that "the validity and existence of said indebtedness and its lien upon *said plantation* was so recognized by said Gallardo" is not sufficient even on *pro confesso* to sustain a decree adjudging a lien against the *whole* plantation. This court has, however, decided that the phrase "certain encumbrances" meant *all* incumbrances (Keller *vs.* Ashford, 133 U. S., 610). So the allegation of a "lien upon said plantation" may well be held to mean upon the whole plantation.

But that is not the extent of the allegation. There are further averments, some of which are quoted verbatim in paragraph (2) of our comments on the *statement* of appellants (*supra*, page 3). For example, it is averred that, after Gallardo obtained a possessory title to the whole plantation by court proceedings (not by direct purchase from his co-owners) and upon his application to record that title in the Registry of Property, he was "required to recognize as valid liens and *agree to pay all* such liens as appeared against *said plantation* upon the books of the old registry, *among which* was the lien hereinbefore described."

Surely these allegations, coupled with those on page 3 of the record referring to the recognition in 1883, are sufficient, if supported by proper evidence where an issue is made or without evidence where they have been taken as confessed, to support a decree for the complainant, so far as the question now under discussion is concerned. As this court has said:

> "This is * * * a sufficiently certain, though general, statement of the essential ultimate facts upon which complainant rests its claim for relief. It was not necessary, in such a case, to aver all the minute circumstances which may be proven in support of the general statement or charge in the bill. While the allegations might have been more extended without departing from correct rules of pleading, they distinctly apprise the defense of the precise case it is required to meet."
>
> St. Louis *vs.* Knapp Co., 104 U. S., 658.

In another part of their brief (page 17), in connection with their contention of the insufficiency of the bill's averments to avoid the defense of prescription, opposing counsel for a similar purpose cite the well-known cases from this court of *Thompson vs. Wooster* and *Central Railroad Co. vs. Central Trust Co.*, but those cases do not go to the sufficiency of the *form* of the allegation if the *substance* is there. In the latter case Chief Justice Fuller said:

> "If the allegations are distinct and positive, they may be taken as true without proof; but if they are indefinite, or the demand of the complainant is in its nature uncertain, the requisite certainty *must be afforded by proof*. But in either event, although the defendant may not be allowed on appeal to question the want of testimony or the insufficiency or amount of the evidence, he is not precluded from contesting the sufficiency of the bill, or from insisting that the *averments* contained in it *do not justify* the decree" (133 U. S., 91).

In that case this court was treating of decrees entered upon bills taken *pro confesso*, and the holding clearly is that, where allegations are merely indefinite or uncertain, the requisite certainty may be supplied by proof, and that only where necessary allegations are wholly lacking may the decree be reversed because not justified by the bill.

That counsel for appellants have a like understanding of the import of those cases is shown by their statement following the quotation from *Thompson vs. Wooster* (page 17) that "instead of requiring the complainants to 'furnish proofs' * * * the court proceeded to a final decree as a matter of course," etc. Here is where counsel fall under a misapprehension. There is nothing in the record to support such a suggestion. On the contrary, although appellants saw fit to omit from their record any showing as to evidence or lack of evidence adduced in support of the bill upon the presentation of the application for final decree, the court will find from a perusal of that decree (page 24) that

counsel for defendants below were "given further opportunity notwithstanding said decree *pro confesso* to be heard as to the form of this decree," and that the court was "fully advised in the premises." Then follow two paragraphs devoted to findings of fact, which, we believe, are in all respects sufficient to make definite and certain any uncertainty in the allegations of the bill and to support the conclusions of law derived therefrom, whereby the validity and effect of the instrument as a mortgage was adjudged in favor of complainants; so that it will avail appellants nothing to contend that certain averments of the bill are "vaguely and insufficiently pleaded" where it appears, as here, that those vague averments have been rendered certain and sufficient by findings of fact.

It is true that the customary form is to have findings of fact stated separately from the decree, but this court has held that matter of form will not be regarded "if a sufficient statement finally emerges" (Crowe *vs.* Trickey, 204 U. S., 228), and that such a statement may emerge even from an opinion if its wording demonstrates that it was intended as a finding.

Rosaly *vs.* Graham, 227 U. S., 584.
Lawson *vs.* U. S. Mining Co., 207 U. S., 11.
Putnam *vs.* Day, 22 Wall., 60.

This court said in the last cited case at page 67:

> "The decree, it is true, may proceed to state conclusions of fact as well as of law, and often does so for the purpose of rendering the judgment of the court more clear and specific."

The facts found in support of the allegations of the bill pertinent to the present question are stated in the decree of the court below (page 24) as follows:

> "That on the 22nd day of December, A. D. 1865, one Ramon Ruiz Gandia was indebted to William

Noble, ancestor of complainants, in the sum of eight thousand and ninety-three dollars gold, for which he gave said Noble a mortgage lien, in addition to the tacit mortgage fixed by the law then in force, upon a certain plantation called 'San José Cacique,' situated within this district and hereinafter more fully described, which he agreed to pay during the following year; that thereafter and before paying any portion of said indebtedness the said Ramon Ruiz Gandia became bankrupt; that thereafter one Ricardo Gallardo, the ancestor of the defendants herein, acquired said property from said bankrupt estate subject to various liens and among them the above lien in favor of said William Noble; and that, upon applying for and obtaining the recording of his title to said property in the books of the New Registry of Property in the year 1882, said Gallardo recognized as valid and agreed to pay certain liens on said property and among them said mortgage lien of said William Noble. * * *

And that, by the recognition of the continued existence and validity of said mortgage indebtedness by said Ricardo Gallardo in the year 1882 as aforesaid and subsequently by notarial instrument in the year 1883, the running of the statute of limitations against said indebtedness was interrupted, and, thirty years not having elapsed from the time of such recognition to the date of the beginning of this suit, the right of the complainants to demand the foreclosure of their said lien upon said real estate is a valid and subsisting right;" etc.

So that, in the absence from the record of the evidence taken preliminary to the entry of the final decree or of some showing that no supporting evidence was in fact taken (neither of which appears in the present record), the presumption must be indulged, we submit, that the decree was properly entered.

Collier *vs.* United States, 173 U. S., 79.
Zimmerman *vs.* Harding, 227 U. S., 489.
Torres Zayas *vs.* Lothrop, 231 U. S., 171.

This, of course, is subject to the exception that the bill be found *entirely wanting* in some fundamental allegation necessary to warrant the decree; but we do not understand the opposing argument as going to that extent, nor, if it did, do we think the court would so find.

Since the Civil Government Act of Porto Rico (31 Stats., 77) was enacted this court has repeatedly held itself to be restricted in its review on appeals from those courts to "the sufficiency of the findings to sustain the legal conclusion or decree based on them" (Garzot *vs.* Rios de Rubio, 209 U. S., 283). While the language of that act has been modified by section 244 of the Judicial Code, under which this appeal was taken, we believe the extent of the review has not been enlarged except, perhaps, where the whole evidence is preserved in the record, as we know of no provision of law where findings of facts could be otherwise reviewed, or the propriety of the decree questioned, where neither findings of fact nor the substance of the evidence appeared.

Marshall *vs.* Burtis, 172 U. S., 630.
Chavez de Armijo *vs.* Armijo, 181 U. S., 484.
Gonzalez *vs.* Buist, 224 U. S., 126.

Thus appellants are remitted to their only possible ground of contention, one which has been already stated: Is the bill *utterly lacking* in any of the averments necessary to support the decree? And this question we have already discussed and answered.

(*c*) *Appellants estopped to deny lien of instrument in suit.*

Lastly, we might grant every contention of abstract law made by appellants without it availing them in changing the result, since the very certificates and documents presented by them to the court below show them estopped to deny that this instrument executed by Ruiz to Noble was an incum-

brance on the realty, and that their ancestor acquired it subject to that incumbrance.

We say *estopped* for lack of a better word, as we are not concerned with technicalities and the exact equivalent of that word is not known to the Spanish law. Perhaps it might be better described as a recognition, or an adoption, or a ratification, by Gallardo, of the mortgage lien of this instrument. By whatever designation it may be expressed in English, the circumstances bring it within the principle of the Spanish law, that "no one can contradict his own acts" (*nadie puede ir en contra de sus propios actos*). (Valdes *vs.* del Valle, 1 Dec. de P. R., 25, 34; 60 Juris. Civ., 231 ; 95 Id., 777.)

Take first the certificate of the registrar as to the entries in the registry of property, beginning on page 12 of the record. On page 15 it is certified, first, that the inscription of the plantation "San José de Cacique" (which is fully described) in the name of Ricardo Gallardo (ancestor of defendants) was the *first* inscription of that property in the books of the *new* registry, and, second, that "the above-described property" *is subject to certain incumbrances,* among which the Noble mortgage is described under the letter "C." It is only necessary to examine the mortgage law, which regulated the making of inscriptions of title in the *new* books and the transcription of the entries existing in the old books, to make clear that this inscription of a *possessory title* could be made only at the request of the owner of that title, and that such request involved the obligation on the part of the applicant to enumerate the liens existing on the property and the duty on the part of the registrar to mention those liens in his entry. The pertinent articles of the mortgage law are the following (we use the language and section numbering of the War Department translation of the law as amended in 1893, but the same provisions were contained in the original law of 1880):

> "Art. 2. In the registries mentioned in the preceding article shall be recorded:

"1. Instruments transferring or declaring ownership of *realty*, or of property rights thereto.

"2. Instruments by which rights of use, use and occupancy, emphyteusis, mortgage, annuity, servitudes, and any others by which estates are created, *acknowledged*, modified or extinguished.

* * * * * * *

"Art. 7. When in any instrument or contract any property interest in real estate is *reserved* to persons *who were not parties* to the same, the notary who executes the deed, or, in the absence of a notary, the official who may issue it, *shall require the record* of the said *property right whenever* the interests of said persons *appear* from the instrument itself, or from the *documents and proceedings* upon which its execution was based.

"If the instrument or contract is subject to record, *and this has been requested*, particular mention *must be made* therein of the *property right reserved*, and of the persons in whose favor the reservation has been made.

"Art. 9. Every record made in the registry *shall* contain the following details:

* * * * * * *

"2. The nature, extension, conditions, and *liens of any kind*, of the interest recorded and its value, if it appear in the deed."

* * * * * * *

Then, turning to the title treating of "Records of Possession," as Ricardo Gallardo had recorded a *possessory* title, we find:

"Art. 390. To facilitate the compliance of the preceding article, to owners who lack a recorded title of ownership, no matter at what period the acquisition took place, they shall be permitted to record their interest by previously proving their possession before the judge of first instance of the place where the estates are located, with the consent of the Department of Public Prosecution and citation of the adjacent property owners, *should they desire* to record the absolute ownership of some estate, and with the cita-

tion of the owner or other participants in the ownership, should they desire to record some property right. * * *

"Art. 391. In the preparation of the papers to which the preceding article refers, the following rules shall be observed: First, the document in which the admission of the proceedings is requested *shall contain:*

"1. The nature, location, area, boundaries, name, *and incumbrances* on the estate, the possession of which it is desired to prove.

* * * * * * *

"Art. 392. Should the notice drawn in accordance with the form prescribed in the preceding article be sufficient, and there be no opposition by a person having a right thereto, or such a position as was made having been abandoned, the court shall approve the proceedings and order that the record requested be made in the registry without prejudice to a third person having a better claim.

"The possessor who may have acquired the decree mentioned in the preceding paragraph shall present to the registry, *in requesting the proper record,* the original papers in the case which have been turned over to him for this purpose, being permitted to transmit therewith a copy of the same on common paper, should he desire to keep them, which, after being compared by the register and the certificate of comparison attached thereto, shall be returned to him, the original in all cases being filed.

"Art. 394. *Records* of possession shall contain *all the details* mentioned in article 391, and also the names of the witnesses who may have testified, the result of their depositions, the result of other investigations made in the proceedings, the opinion of the Department of Public Prosecution, and the special circumstances of the record, according to its character, so far as they appear from the papers in the case." * * *

Therefore, reading the certificate of the Registrar as it appears on page 15 of the record in the light of the foregoing

provisions of law, we must conclude that Ricardo Gallardo requested the inscription of his *possessory title*, acquired in the manner prescribed by articles 390-2 aforesaid; that the proceedings in court as presented to the Registrar with his request contained his petition in which were stated the matters prescribed by article 391, one of which was the "encumbrances on the estate"; that when the registrar came to record the title, according to the request, he complied with article 394 by stating in his inscription "all the details mentioned in article 391," one of which was a notation of the "encumbrances on the estate" as contained in the possessory proceedings, and that one of those encumbrances was the Noble mortgage.

The list of encumbrances enumerated in the Registrar's entry was, therefore, but a repetition of those enumerated by Gallardo himself in his petition to the court whereby he had been granted his possessory title; and that petition must have stated that the instrument now in suit constituted an incumbrance or lien upon the whole property. No other conclusion is consistent with the presumption always indulged that public officials, and especially courts, have properly performed their duties and complied with the laws.

Philadelphia, etc., R. Co. *vs.* Howard, 13 How., 307, 332.

Lopez *vs.* Registrar, 15 P. R., 712.

Inchausti *vs.* Registrar, 17 P. R., 566.

Vilella *vs.* Vilella, 18 P. R., 214.

Of course this action would not preclude Gallardo or his heirs from pleading as a defense the *subsequent* running of the statute of limitations so as to bar the claim, a question which is separately treated hereinafter under Point III; but they should certainly be precluded from denying that *at that time* (1882) the indebtedness represented by the instrument in suit constituted a valid and subsisting incumbrance and lien upon the property *as then recorded* at Gallardo's instance.

Such would certainly be the result under the decisions of this and other American courts.

Jerome *vs.* McCarter, 94 U. S., 734.
Swann *vs.* Fabyan, 110 U. S., 590, 601.
Keller *vs.* Ashford, 133 U. S., 610.
Wellington *vs.* Jackson, 121 Mass., 159.

But doubtless the Spanish and Porto Rican decisions should control, as the island was at the time of these transactions under Spanish sovereignty, and those are as numerous as our own.

Finlay *vs.* Finlay, etc., Co., 8 P. R., 371, 391 (par. 11).
Fernandez *vs.* Gutierrez del Arroyo, 10 P. R., 59, 69.
Torres *vs.* Lathrop, Luce & Co., 16 P. R., 172, 181.
(Same case on appeal,) 231 U. S., 171, 180.
Pellicier *vs.* Fernandez, 19 P. R., 111, 117.
Prado *vs.* Estate of Rio, 15 P. R., 489, 494.

The last-cited case was one where such an estoppel was claimed because the defendant had *witnessed* an instrument containing the recital of a fact which he disputed, but the mere acting as a witness was considered insufficient, the court declaring the principle to be that—

> "the law requires some *act or admission* on his part which would show a *knowledge* of the alleged legal tacit mortgage existing in favor of" the complainant.

A practically identical case is found in the reports of the Supreme Court of the Philippine Islands as administered under American sovereignty. There the defendant had been the actor in obtaining a possessory title to lands for the benefit of the plaintiffs, his nephews, and afterwards claimed the property for himself. His action before the court was held to be such a recognition of their rights as estopped him from denying their title.

Broce *vs.* Broce, 4 Philipp., 611.

Moreover this principle is more directly applicable to *heirs* under Spanish than under American law because of the rule of the former that an heir who accepts his inheritance becomes personally responsible to the full extent of his own property for the obligations of his ancestor. (Escriche, "Heredero," pars. I, XV, XVIII.)

We therefore submit that the allegations of the bill must be held sufficient to warrant the final decree.

POINT II.

The Instrument Did Impose a Tacit or Legal Mortgage upon the Plantation Described in the Bill.

The discussion of this point in the brief for appellants is made to rest largely upon the technical legal meaning of the Spanish word "refaccion." It is true that the instrument is described in complainants' bill as a "contract of refaccion," but the real question is not whether that description is technically correct, but whether as against the heirs of Gallardo the instrument did impose in law a lien upon the real estate, or the subsequent acts of Gallardo estop his heirs from denying the existence of such a lien.

If either of those propositions be accepted, as we believe we have above shown they must be, it matters little what may be the proper technical designation of the character of the instrument. Opposing counsel state in their opening paragraph under this point that "the instrument does not so describe itself," that is, does not describe itself as a "contract of refaccion"; but in this we think counsel have been led into error by failing to bear in mind that the language used is the translation of thought expressed in another tongue.

In our discussion of the first *point* we called attention to certain provisions of the instrument which we deemed

especially material, among which that numbered (3) (page 7, *supra*), was intended to cover this particular contention, and we quoted the language from which opposing counsel draw the supposed distinction between the manner of describing the Goenaga mortgage and the one in suit. That language is that the Goenaga mortgage must be paid during October, 1866, "thereby being canceled *that deed of refaccion,* and Ruiz (hereby) obliged not to execute any other agreement or deed with damage to *this present one.*" We think that even in the English it may well be inferred that the two phrases above italicised are placed in juxtaposition as referring to two instruments of similar character, that is, that the word "one" is used in place of and to avoid the repetition of the phrase "deed of refaccion"; but to one familiar with the construction of Spanish that use is much clearer because it is characteristic of that language. In other words, we believe that the scrivener thought he was clearly conveying the idea that the instrument he was writing was a "deed of refaccion" equally with the one to which he was referring. That belief is further supported by the sense of the provision in which it is contained. If this were not such a deed it could not be "damaged" by the subsequent execution of another, while if it was it could be, because the refaccion liens attached in the inverse order of their creation, the money last furnished having the prior right to repayment, like admiralty liens upon a ship (Escriche, "Hipoteca," par. XXIX). But, apart from whether it "so describes itself," we believe that, without straining the intent of the old law, this contract may be construed to be one of "refaccion," because of its character. Opposing counsel merely quote the words of the ancient law and then come forward for their definitions to laws and statutes adopted since the contract was made. So far as authority is concerned they are content with a reference to the opinion of Judge Hamilton and his construction of some of the cases cited to him by the undersigned as counsel

for the Goenaga Succession in the intervention hearing. Let us see whether Judge Hamilton's conclusion is well derived.

Escriche, whom we have before quoted, explains the refaccion lien (hipoteca refaccionaria) as follows:

> "Todas las hipotecas son legales en cuanto la ley arregla la forma y condiciones de su establecimiento; pero se llama particularmente *legal* la que sin estipulación de las partes ni condenación judicial resulta precisamente de la ley. Dásele tambien el epiteto de *tacita*, porque no es el juez ni el deudor quien la constituye, sino solo la fuerza de la ley que tiene dispuesta preventivamente esta garantia á favor de personas que necesitan de su especial protección ó que presentan una razon conocida de preferencia en el pago de sus créditos. La ley en efecto constituye hipoteca por si mismo, ó porque asi lo exige la calidad de las personas, ó porque interesa en ello el bien del Estado, ó por razon de algun beneficio notable que una persona hizo á otra, ó porque presume que tal es ó debe ser la voluntad del deudor." (Diccionario de Legislacion, "Hipoteca," par. VIII.)

(*Translation.*)

> "All mortgages may be designated as legal, inasmuch as the law regulates the form and conditions of their creation; but that one is particularly called a *legal* mortgage which results necessarily from the law alone without any consent of the parties or judicial compulsion. It is also designated by the adjective *tacit*, because it is neither the judge nor the debtor who constitutes it, but solely the force of the law which possesses already prepared this guaranty in favor of persons who need its especial protection or who present a recognized ground of preference in the payment of their claims. In effect the law itself constitutes the mortgage, either because the character of the persons so requires or because the good of the State is involved in it, or because of some notable benefit which one person has caused another, or because it presumes that such is or ought to be the wish of the debtor."

Thus it is explained that the language of the old *Partida* merely stated a principle which is to be applied to varying circumstances as they may arise, and that is exactly what the Supreme Court of Spain has repeatedly held.

Take, for example, one of the cases referred to, but its meaning apparently ignored, by Judge Hamilton in his opinion: that decided on October 11, 1894, and reported in 76 *Juris. Civil de Esp.*, 196. That case involved the enforcement of a lien for the furnishing of tubing to the Water Works Company of Barcelona, and it has the rather interesting coincidence that the company which had contracted the debt was also a bankrupt, and the real defendant was a corporation which had acquired title to the property through that bankruptcy. The two pertinent principles there announced as applied to the case at bar are (1) that the contract need not be with the owner at the time of the enforcement of the lien, and (2) that a lien results upon the benefited property ("finca refaccionada") for any indebtedness which may have been applied to the purchase, construction or repair of ships, the building of houses, the purchase of land or *other similar things* ("que hayan servido para comprar, fabricar ó reparar nave, ó edificar casa, ó comprar tierra ú *otras cosas semejantes*"). So its application is not confined to the enumerated classes of cases, but extends to money devoted to "other similar things," that is, the lien follows the money into that thing in connection with which the money was used.

Another case in which the same principle was applied will be found reported in 18 *Juris. Civil,* 134, decided on July 2, 1868. There a subcontractor brought suit to enforce his lien for a "crédito refaccionario" (refaction debt) for work done by him for the contractor in the building of a railroad. The defendant railroad company set up that it had no contract with the plaintiff and that the work done was not such as to give a lien. Plaintiff asked for the annotation of the suit in the registry of property so as to preserve his rights

pending the suit, which the company opposed on the ground that he showed no right to a lien against real estate, which was the only kind of a lien allowed to be recorded. The lower court refused the annotation, but the Supreme Court reversed that decision, holding (1) that the mortgage law confined the right of annotation in its records to those whose claims affected some right in real estate (derecho real); (2) that the plaintiff in that case was included within the class specified, and (3) that, as plaintiff's claim did constitute an interest in real estate, the refusal of the annotation deprived him of a substantial right.

In addition to the direct application of the cited case to the case at bar it is important as directly holding that the mortgage law in force in the late 1850's (which was the same in force in 1864) allowed the record solely of contracts affecting the *real estate,* and that the contract, in order so to affect the real estate benefited by the money, need *not* be made with the *owner.* This latter proposition is directly stated in many other cases (Juris. Civil, vol. 18, pp. 570 and 612) and entirely meets Judge Hamilton's contrary conclusion in paragraph 3 of his opinion (page 27).

If, therefore, only contracts affecting interests in real estate were admissible to the *record of mortgages,* the express agreement of the parties in this instrument that it should be recorded in that record is persuasive evidence that *they* at least *intended* that it should affect the real estate and bind the owners thereof.

Another case in point is a decision of the same court on May 26, 1888, on an appeal from the Audiencia of Cuba, reported in *63 Juris. Civ., 837.* The facts were that in 1872 a man named Fournier died in Cuba possessed of a sugar plantation and other property and leaving a will under which his son was named as his heir and one Thaureau was to receive a legacy. After testator's death his executors made a contract with the firm of Brooks & Co. to furnish supplies for the plantation and the indebtedness

thereunder was in due time liquidated in a notarial document exactly as in the case at bar. An express mortgage was then given by the heir, but as that could bind only his interest, it was clearly inferior to the rights of the legatee. The debt not being paid, Brooks & Co. brought suit to foreclose, basing their claim to a lien upon the character of the debt as well as upon their express mortgage, and the legatee Thaureau intervened, questioning the preference claimed by Brooks & Co. in the real estate. The Cuban court sustained the contention of Thaureau, but the Supreme Court of Spain reversed that decision and upheld the contract as conferring a privileged lien upon the plantation, saying, among other things:

> "Moreover, there being conceded by the old legislation, applied in the present case to the refaccion creditors, a *tacit mortgage and preference* upon the thing subject to the refaccion superior to all the creditors who were not specially privileged, legatees not being included in this category, the decree appealed from, in giving to a claim of this class which the intervenor (Thaureau) presents a preference over that of said firm, which is not denied to be one of refaccion, violates laws 26, 28, and 29, title 13, partida V."

Hence the Audiencia of Cuba was directed to reverse the trial court and cause it to enter a decree confirming the foreclosure of the indebtedness of Brooks & Co. as a lien upon the plantation. It seems difficult to distinguish that case in principle from the case at bar, as throughout the colonial legislation the same land laws have been made applicable to Cuba and Porto Rico. In that case the contract was made by executors of a will, parties having only a special control over or interest in the property; in the case at bar by a part owner in possession as lessee. There the party contesting the validity of that lien was a special beneficiary under the will of the owner; here the contestants are general beneficiaries as heirs of an intestate owner. In each case the money was applied, though in different ways, to the payment of obligations directly connected with the property.

It has thus been demonstrated, we think, that the instrument in suit comes within the general class recognized as "créditos refaccionarios" as defined by Escriche and applied by the decisions of the Supreme Court of Spain and governed by the provisions of the Royal Cedula of April 11, 1852, requiring their liquidation and registry in the "Anotadurias." But, whether so or not, we return to our insistence that these defendants, as heirs of Ricardo Gallardo, are estopped to deny that "San José de Cacique" is subject to a lien under the instrument in question for the reasons set forth in the last subdivision of the previous point.

POINT III.

Defense of Prescription Not Sustained.

The great trouble with the argument for appellants upon their contention of prescription is that, when the condition of the record is taken into account, very little of it is material. Their argument glides along smoothly without a single reference to the record which they have brought here.

In the first place, we take it to be settled law that the defense of prescription, or the running of a statute of limitation of actions, is one which from its nature, if not pleaded, is waived.

Shields *vs.* Shiff, 124 U. S., 351, 357.
Burnett *vs.* Desmornes, 226 U. S., 145.
Banco de P. R. *vs.* Font, 14 P. R., 561, 569, top.

And that rule applies to suits in equity as well as those at law where they are of "concurrent jurisdiction," that is, where the appeal to equity is made because of the kind of relief sought, not because of the nature of the right—and a foreclosure suit is one of that class.

Jones on Mortgages (5th ed.), secs. 1172, 1214*a*, *b*.
Sanger *vs.* Nightingale, 122 U. S., 176, 183.

The plea interposed in the present case was to the "whole of the bill" and its substantial paragraphs were in the following words:

> "That the cause of action herein, if any ever existed, which defendants deny, accrued in the year 1865; that said cause of action, if any ever existed, which defendants deny, is a demand that has long time since been and is now barred and is extinct by law and especially by article — of the Mortgage Law of May, 1880, article 134 of the Mortgage Law of May 26, 1893, and articles 1864, 1865, clause 3 of article 1867, and 1840 of the Civil Code now in force in Porto Rico, and by articles 1963, 1964, clause 3 of 1936 and 1939 of the Civil Code of Porto Rico of 1889.
>
> "That the plaintiffs ought not to have or maintain their suit herein, for that if any cause of action ever existed against these defendants, or any of them, the same accrued more than thirty, twenty, fifteen and five years respectively, prior to the time of the bringing of this suit," etc.

This plea was "set for hearing" by the complainants, and upon that hearing was "overruled" (Record, pages 7, 32). Unless there was error in that ruling, this point cannot be upheld, and we think the ruling below can be sustained on several grounds:

First, the plea was bad in form—duplicitous or double.

In equity a double plea is never allowed except by special permission of the court. This record shows no permission granted, or even asked, to file such a plea. Each statute pleaded constituted a separate defense and should have been pleaded in a separate plea—if the court had given permission for more than one plea.

McCloskey *vs.* Barr, 38 Fed. R., 165.
Benson *vs.* Jones, 1 Tenn. Ch., 498.
Saltus *vs.* Tobias, 7 John. Ch., 214.

And upon a hearing as to its sufficiency, if a plea be found double, it should be overruled.

Sharon *vs.* Hill, 22 Fed. R., 28.

Second, the plea was insufficient because upon its face it stated no defense to the averments of the bill as made.

The bill alleged an interruption of the running of statute of limitations by a recognition of the debt, and the plea contained no denial of that recognition. Any question raised by this plea as it is worded might well have been, and could only properly have been, raised by demurrer because it questions the sufficiency of the bill upon its face as to this question of prescription and alleges no fact denying or avoiding the fact of interruption alleged in the bill. Mr. Foster says in his work on Federal Practice (3rd ed., vol. 1, sec. 131) that—

> "The plea of the statute of limitations is in substantially the same form as a similar plea in an action at law, but no special form is essential. If the bill charge fraud or other matters, which, if true, would prevent the statute from depriving the complainant of relief, the plea must deny them."

The author cites as authority *Stearns vs. Page,* 1 Story, 204; while in *Farley vs. Kitson,* 120 U. S., 303, discussing the effect of a plea, this court said:

> "The allegations of the bill that plaintiff * * * in all things acted honestly and in good faith towards all persons interested in it, *were not denied* by the plea, and therefore, for the purpose of the hearing thereon, *were conclusively admitted* to be true" (page 318).

So here, the allegation of interruption by recognition not being denied was conclusively admitted, for the purpose of the hearing had, and the plea could not have set forth a good defense *unless* the period between the date of recognition alleged

(1883) and the time of the commencement of the suit was sufficiently long to act as a bar. The bill was filed in 1908, so that the period since the recognition was about twenty-five years. But the Supreme Court of Porto Rico, following therein the Supreme Court of Spain, has expressly decided that the only limitation for actions to foreclose mortgages executed in Porto Rico before the year 1880 (that is, before the promulgation there of the first mortgage law or either of the modern codes) is *thirty years*, pursuant to the law in force at the time the contract was executed and unaffected by subsequent legislation.

Suc. of Firpo *vs.* Suc. of Pino, 14 P. R., 100.
Juris. Civil de España, vol. 64, p. 256; vol. 91, p. 107.

The matter of limitation is clearly a rule of real property within the scope of the decisions which make such rules as declared by the local courts conclusive.

Rijos Cordova *vs.* Folgueras y Rijos, 227 U. S., 375.
Dupre *vs.* Mansur, 214 U. S., 161.
Romeu *vs.* Todd, 206 U. S., 358.

Hence, in order to show error in the overruling of this plea it must be held that its allegation of a thirty-year prescription is good, notwithstanding an uncontradicted allegation in the bill of an interruption of the statute within twenty-five years. According to *Farley vs. Kitson, supra,* that uncontradicted allegation was conclusively admitted to be true; hence the plea was insufficient on its face and was properly overruled.

Third, the plea was bad in form because it did not sufficiently set up the only applicable statute of limitation—that of thirty years.

If this court follows the above decision holding that the limitation applicable to this action was thirty years, then this plea presents no defense (even other considerations

apart) because the law fixing that limitation is not referred to in it. The first paragraph above quoted from the plea enumerates the different statutes upon which dependence is placed by the pleader—all of which originated long subsequent to the execution of the mortgage in suit, and no one of which fixed a longer period than twenty years. Counsel for appellants, on page 15 of their brief, quote the proper law (63 of Toro) as incorporated in the Novisima Recopilacion, but that law is nowhere referred to in the plea. In other words, the plea was intended as a drag-net to draw within it all the possible statutes of limitation, yet it failed to catch the only applicable one.

We might leave the argument here as having covered the whole legitimate ground material under the record as presented; but as opposing counsel have presented certain other considerations we will add a word of comment upon some of them.

It is stated that the "alleged recognitions" were "too indefinitely and insufficiently pleaded to tender a proper issue." If so, it was a matter for demurrer or exceptions for insufficiency (under the old rule); but counsel then representing the defendants below seemed to find no difficulty in understanding what was alleged. If by "pleading the terms of the instruments themselves" counsel mean that they must be exhibited to or incorporated in the bill, we know of no such requirement; old rule 26 (then in force) seems rather to discourage such a practice. If the phrase referred to was used with another meaning, we are in doubt just what was meant.

It is next suggested that these allegations of recognition "might more appropriately have been reserved for a special replication" under the old rules. In the first place, we know of no such pleading in the former Federal equity practice as a "special replication." Rule 45 expressly forbids one and rule 66 provides the only replication allowed (Duponti *vs.* Mussy, 4 Wash. (C. C.), 128; Mason *vs.* H. P. & F. R. Co.,

10 Fed., 334). In the next place, rule 21 expressly permits a complainant to "state and avoid by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defense or excuse," and Mr. Foster says:

> "It is often important for the plaintiff to thus meet a defense which he anticipates. For as special replications are not allowed, he may thus save the delay of an enforced amendment of his bill, in order to plead new matter as a reply to a defense in the answer" (Fed. Prac., 3d ed., sec. 76).

As counsel so much insists, it was some forty-three years since the cause of action had originally accrued and, in the absence of an allegation of recognition, the bill would have been subject to a special demurrer on that ground had one been interposed (Mercantile Bank *vs.* Carpenter, 101 U. S., 567), hence the propriety of such an allegation.

Again, it is suggested that "the pleadings are somewhat loose on both sides" because "no replication at all was put in," and from this it is deduced that "on the record the plea of prescription stands admitted in point of fact, and challenged only on the ground of legal sufficiency." Of these several statements only one is correct. It is taking us back to the A B C of equity pleading to point out that no replication was necessary or proper unless complainants desired to *join issue* upon the *facts* alleged in the plea. But there were no facts alleged. The plea merely set up a defense of law. So it was "set for hearing" under rule 33, although it might also have been stricken from the files on motion as being the equivalent of a demurrer.

Furthermore, while the plea surely "stood challenged on the ground of its legal sufficiency," it did not "stand admitted in point of fact," because it contained no *facts* to be admitted; and, even if its allegation of thirty-year prescription be regarded as that of a fact, *Farley vs. Kitson, supra,* rules it and declares it insufficient so long as the effect of

the alleged fact is avoided by an averment of the bill not denied by the plea, as was demonstrated on page 3, *supra*.

Opposing counsel then, upon their page 16, proceed to discuss what was made clear upon "application for leave to answer"; but as that application and all papers connected therewith were filed some five months *after* the overruling of this plea, and as the denial of that application is one of the errors claimed under their point IV, we reserve our comment until that point is reached.

On page 17 of their brief occurs their quotation from *Thompson vs. Wooster*, and their argument regarding the obligation of complainants, in view of the principle there declared, to "furnish proofs," an argument which we have already answered in its appropriate place (*supra*, p. 16).

We believe we have now met and refuted every suggestion, however immaterial it may be, brought forward by appellants in support of their plea of prescription.

POINT IV.

Complainants Entitled to Remedy Pursued and Refusal to Open pro Confesso Not Abuse of Discretion.

Counsel for appellants have here united two entirely distinct contentions, as their argument in support of them shows, and we shall so treat them.

(1) *Complainants were entitled to the remedy pursued.*

Being subjects of the King of Great Britain and Ireland they were entitled to seek the Federal jurisdiction (Ortega *vs.* Lara, 202 U. S., 339), and in that court to pursue any method of procedure conformable to its practice.

Gaines *vs.* Chew, 2 How., 619, 650.

Smyth *vs.* Ames, 169 U. S., 466, 516.

And the procedure followed is the only one known to the Federal court for the foreclosure of mortgages. However, the method of foreclosure outlined in appellants' brief, which is that provided for by the mortgage law itself, is not the exclusive remedy even in the local insular courts. A plaintiff has his option to follow that which is often called the *summary proceeding* or the ordinary procedure of the civil code.

Hernandez *vs.* Fernandez, 17 P. R., 111, 114.
Gimenez *vs.* Brenes, 10 P. R., 124.

Neither is there any force to the other objection suggested by counsel, that the record of the mortgage in the "Anotaduria" had not been transferred to the Modern Registry. It was sufficient that its existence in the old book was *noted* in the first inscription in the new.

Del Moral *vs.* Registrar, 20 P. R., 391, 393.
Navarez *vs.* The Registrar, 10 P. R., 236.
Decision of May 22, 1889, 65 Jur. Civ., 725.

That notation was made at the instance of Ricardo Gallardo; hence neither he nor his heirs can be regarded as "third persons" (the phrase used in the mortgage law in a sense more or less equivalent to the "innocent holder" of the American law), and it is shown by the law as quoted by counsel for appellants (page 19) that the only effect of non-transference is that "it shall not operate to the prejudice of *third persons.*" Moreover, it has been repeatedly decided by the Supreme Court of Porto Rico that such transfer is "unnecessary where the contention is between parties," and that, of course, equally applies to privies in title.

Suc. of Firpo *vs.* Suc. of Pino, 14 P. R., 100, 105.
Hernandez *vs.* Cuebas, 16 P. R., 519.
Batista *vs.* Taboas, 15 P. R., 382.

It is undisputed that appellants possess and claim to own the plantation in question as the *heirs* of Ricardo Gallardo. It was held that heirs are not "third persons" in the above-

cited case of *Hernandez vs. Cuebas* and in many decisions of the Supreme Court of Spain.

Decision of Jan. 28, 1892; 71 Jur. Civ., 99.
Decision of June 6, 1899; 87 Jur. Civ., 402.

It has been further held in various cases by the Supreme Courts of both Spain and Porto Rico that *no one* can be a "third person" who acquires property *with knowledge* of the existence of an incumbrance, even though unrecorded.

Valdes *vs.* del Valle, 1 P. R., 75.
Suris Cardona *vs.* Quiñones, 17 P. R., 614, 643.
Carmona *vs.* Cuesta, 18 P. R., 178, 184.
Cuebas *vs.* Territorial Bank, 19 P. R., 1109, 1112.
Decision of Feb'y 7, 1896; 79 Jur. Civ., 252, 260.
Decision of May 13, 1903; 95 Jur. Civ., 773.
Decision of March 24, 1905; 100 Jur. Civ., 679.

There is still another consideration why appellants may not be regarded as "third persons." Holding as heirs of Ricardo Gallardo, their rights can be no greater than his would have been, and *he* could not have claimed the benefit of that condition because he acquired the title to the plantation *before* the new registry was created.

Diaz Caneja *vs.* The Registrar, 5 P. R., 175, 183.

It might also be suggested that appellants are estopped to deny due registration, as their ancestor assumed payment of the debt.

Patterson *vs.* de la Ronde, 8 Wall., 292, 301.

For all the foregoing reasons it can make no difference that no transfer of the actual inscription *in extenso* of said mortgage had been made to the modern books.

But on page 20 of the brief for appellants a point is made of the refusal of the registrar holding office in 1906 to record this instrument in the modern books. Even Judge Hamilton recognizes that there is nothing in that (their brief, page

29), and he could not well do otherwise under the decisions. The presentation of that petition to the registrar at that time was entirely superfluous, except as against the chance that appellants might attempt to sell and convey the plantation to a purchaser who *might* perhaps become a "third person," though even that is doubtful. The provision there cited for appellants allowing appeals from refusals of registrars to record instruments is for the benefit of those to whom the *recording* is the important matter. But that remedy is not exclusive; the bringing of a suit with its *lis pendens* may answer the same purpose. Those appeals from the decisions of registrars, like the decisions themselves, are always *ex parte,* have none of the elements of *res judicata,* and were not intended to interfere with the independent investigation and determination by the courts of the legal questions involved.

Ramirez *vs.* Registrar, 16 P. R., 330.
Fernandez *vs.* Registrar, 17 P. R., 1021.
Martinez *vs.* Registrar, 18 P. R., 488.
Decision of Dec. 30, 1896, 80 Jur. Civ., 907.

Indeed, if the rulings of registrars were to be considered determinative of the law, appellees would be safe, since the first registrar in 1865 considered the instrument entitled to record as a mortgage and *recorded it,* the registrar of 1882 (custodian of both the old and new books) coincided in that opinion and *noted it as a mortgage incumbrance,* while the registrar of 1906 alone differed from them and refused to record it, interpreting it as a lien on the *crops alone.* It being admitted by appellants (brief, pages 10, 11) that the ancient and modern recording laws equally excluded from the records instruments not affecting the real estate (*bienes raices*), it must follow that the action either of the two former registrars or of the last one was erroneous. It is submitted that, if any consideration is to be given to the action of these registrars, it must be in favor of appellees, since not only

were the rulings two against one in favor of our theory of the effect of the instrument, but the rulings in our favor were also those of registrars serving during the epoch in which the old law was in force; and it must be admitted that, in interpreting and applying the law of any epoch, the officials incumbent during that epoch would be more likely to interpret and apply correctly both the law and the meaning and effect of instruments drawn under it.

So it appears that this suit was maintainable in the courts of Porto Rico as well as in those of the United States, using the form of procedure suitable to the respective court; that a bill in equity is the only suitable procedure in a court of the United States; and that the question of the recording of the mortgage is not material.

(2) *Refusal to Open Pro Confesso Not Abuse of Discretion.*

Counsel for appellants recognize that the rulings upon motions of this kind are "to be regarded as a matter of discretion and not reviewable here" (brief, page 21), but in addition to the reasons just discussed they state on the same page and on page 16 two reasons why that discretion was here abused: (page 16) because the recognitions of the debt in 1882 and 1883 were shown to be insufficient by the records presented by defendants; and (page 21) because "before the entry of any final decree the existence of several complete defenses" was demonstrated by defendants. Let us consider these grounds in their order.

First, did these records prove the recognitions alleged to be insufficient in law to stop the running of the statute of limitations?

We have already discussed under point I-*c* the effect of that part of one registrar's certificate contained on page 15 of the record and, we think, have there made clear that, far from the entry there certified being "a mere recital by the recording office" and "not executed or assented to in any way

by the new owner," it was a recital required by law to be made at the request of the "new owner" and taken from the statements of such new owner in a petition presented by him to the court for the purpose of obtaining the very title of which he was requesting the recording. How could a recognition be made more solemn or binding?

It may be well here to advert to a misprint in this paragraph on page 15 (which begins with the word "First"), though no point is made of it in appellants' brief. Just previous thereto it is explained that the inscription was made by Gallardo "subject to the following incumbrances," and the purpose of this paragraph is to describe those incumbrances. The third incumbrance specified is designated by the letter "C" and described as "a mortgage in favor of Don Guillermo Noble for sixteen thousand one hundred and eighty-six crowns (escudos) 26 hundredths." At this place an error of omission has evidently occurred in the copying, as the next words "in favor of Don Pedro David," etc., must refer to another mortgage because it goes on to describe it as "inscribed at folio 121, number 242," while the bill alleges that the Noble mortgage is inscribed at folio 7 under number 11, the correctness of which is proven by the second certificate of the registrar (page 16).

In addition to the paragraph already discussed this certificate, beginning on page 12, contains only four matters: a recital of the preventive annotation made on the presentation of the Noble mortgage for record by one of the appellees and its refusal by the registrar in 1906 (pages 12-14), the cancellation of that annotation (page 14), the detailed boundaries of the plantation (pages 14-15), and the *lis pendens* of the present suit (pages 15-16). None of these affect the present question.

Thus it is seen that, so far as this certificate is material, it substantiates, instead of contradicting, the allegation of the bill (page 2, middle), that—

> "thereafter said Gallardo obtained from the proper court a possessory title as owner of said plantation and, upon applying for the registry of said title in the year 1882, he was required to recognize as valid liens and agree to pay all such liens as appeared against said plantation upon the books of the old registry, among which was the lien hereinafter described, and that the validity and existence of said indebtedness and its lien upon said plantation was so recognized by said Gallardo, as appears duly noted in said registry in book 2 of Loiza, folio 2, estate No. 48, first inscription";

that being the inscription referred to in the certificate as "subject to the following incumbrances," one of which was the Noble mortgage.

The second certificate from the registrar (page 16) consists simply of a verbatim copy (in translation) of the record made of the Noble mortgage in the old "Anotaduria" and was doubtless presented on the theory that it supported appellants' contention as to its being only a lien on the crops. But the language does not warrant that conclusion when read in the light of the law as then existing, as has been already explained. Naturally it specifies only what was specified in the instrument itself as to the *express* lien, also showing the liquidated amount of the debt and the name of the plantation affected by it (the name being one of the recognized methods of description), leaving it to the law to *imply* the tacit lien given in such cases for the reasons hereinbefore discussed. In other words, we are simply brought back to the question of the character and legal effect of the instrument itself. It was at any rate *recorded as a mortgage* which, in view of the admission of counsel for appellants that the purpose of the "Anotaduria" was limited to the record of *interests in real estate*, should carry with it the presumption that it constituted such an interest. Such record was at least notice to the world that such an interest was claimed, and the legal effect of the instrument

is to be determined by its own terms, not by the language of the registrar (80 Juris. Civil, 907, already cited).

It will, of course, be gathered from a reading of these certificates that the entries in the registry were not verbatim copies of the instruments recorded, but *abstracts of their substance* to be made by the registrar according to his best judgment of their meaning. The real record of the instrument was in the protocol of the notary who had drawn it, reference to which is always made in the entry.

The only remaining document is the "Acquittance" (pages 17-19). It is a notarial document executed by Ricardo Gallardo and certain third parties, described as trustees of the bankrupt estate of Ruiz. As hereinbefore stated, it was produced by appellants to support an allegation of payment of the Noble debt, made in the affidavit presented with the motion to open the *pro confesso*, and the primary object of the parties to it doubtless was to release Gallardo from the debts described therein. The amounts of the two debts are similar, but the different places of inscription and names of creditors demonstrate that it was a debt due to Turull which was released. So it can have no bearing as a defense. Yet it is one of the documents material in showing a recognition of the Noble debt in 1883. It describes the plantation and the place of inscription of Gallardo's title in the registry—the identical inscription of the certificate on page 15. Then it contains, in its paragraph "second" (page 18) the admission that "at the time of entering said inscription of possession there *were charged to the above-described property* several liens to which *the same was subject*, according to the books of the old 'Anotadura' of mortgages, amongst which there is" that of Turull, which was thereby released. In the following paragraph ("third") there is the further admission that Gallardo recognized himself as being "the owner of the property *subject to the liens thereon.*"

This admission that at the time of the inscription of the property it was subject to the "several liens" charged to it,

coupled with the direct reference to the book and page of such record where those "several liens" are enumerated, cannot be less than a recognition of the then existence of those liens, one of which was that now in suit, and a ratification of their validity; and even the direct assumption of its payment is indicated by his further statement that "he has been paying the same on different instalments." It was because of this admission that the court below, although defendants alleged no proof of any specific payment, limited the recovery of interest to the date of recognition which otherwise would have been reckoned from maturity of the debt.

Altuna *vs.* Ortiz, 12 P. R., 318.
Suc. of Firpo *vs.* Pino, 14 P. R., 100.
Decision of Oct. 15, 1874, 30 Juris. Civ., 569.
Decision of July 9, 1888, 64 Juris. Civ., 255.

Having thus analyzed and made clear just what these records did show as to recognition, we reach the inquiry, Was that recognition legally sufficient to stop the running of the statute of limitations?

It is easy to cite conclusive authority that it would be under the American law.

Jones on Mortgages (5th ed.), secs. 1196, 1201.
Barned *vs.* Barned, 21 N. J. Eq., 245.
Cook *vs.* Parham, 63 Ala., 456.
Kellogg *vs.* Dickenson, 147 Mass., 432.
Palmer *vs.* Butler, 36 Iowa, 576.
Moore *vs.* Clark, 40 N. J. Eq., 152.
Hughes *vs.* Edwards, 9 Wheat., 489.

While the Spanish authorities are not so numerous we believe they cover the same ground in principle.

Decision of July 14, 1871, 24 Juris. Civ., 369.
Decision of Jan. 12, 1893, 73 Juris. Civ., 45.
Prado *vs.* Estate of Rio, 15 P .R., 494.

Second. Did defendants present to the court below before the entry of the decree "several complete defenses" or a single complete defense?

We think not. As counsel for appellants refer to these "complete defenses" as "supported by public records," their reference must be to the same defenses which we have already discussed. That is further indicated by the contents of their proposed answer, which they presented on the day of the hearing of their motion and asked leave to file (pages 19-22). A reading will convince the court that it covers or discloses no defenses not already disposed of in the foregoing argument. The idea that these public records disclosed "complete defenses" rests, we take it, upon the mistaken opinion as to their import which we have already demonstrated and needs no further discussion.

However, a few words of comment may not be amiss to indicate more specifically that the answer (page 19) presented no real defense. The first two paragraphs, besides certain admissions of matters alleged and one or two immaterial assertions, consist of averments of legal conclusions which have been already fully discussed. The third paragraph consists of legal conclusions supported by a verbatim repetition of the entry in the old "Anotaduria," which is contained in the second certificate of the registrar, the effect of which has been already commented upon above. The fourth and fifth paragraphs consist entirely of admissions except the denial that Gallardo acquired the property subject to the Noble lien or ever recognized its validity, which is really a conclusion of law and has been already covered by our argument.

Paragraph VI retracts the averment previously made by defendants' then counsel in his affidavit, by admitting that defendants "have no information whatever as to whether or not the said Ruiz Gandia ever paid the said Noble the said sum or any part thereof," and "are not in a position to an-

swer and allege whether Noble's indebtedness and claim against Ruiz was ever proved, allowed and paid by the trustees of the latter's estate." It then repeats the denial that said indebtedness constituted a mortgage lien and sets out the petition of the appellees to the registrar for its transfer to the modern registry and the registrar's denial of the same—matters which have been already discussed and shown not to constitute a defense.

Paragraph VII, and last, again repeats the denial that Gallardo ever recognized the existence of the Noble indebtedness and its lien upon the real estate, a contention which involves nothing new. But we might in this connection call to the court's attention that no defense of prescription or the statute of limitations is made in this proposed answer. The plea in which that defense was attempted had been long before overruled and, in the absence of such a defense in the answer, any allegation regarding recognition was immaterial. So that, any such question having been saved by the ruling on their plea, these averments presented no reason for reopening the case. Nor did that answer suggest any defense founded on the fact that Ruiz was only a part owner.

Finally it may be suggested that, while the bill of complaint waived an answer under oath, there had been no waiver of the rule requiring an answer to be *signed* by the defendants; yet the answer proffered was signed by counsel only. Hence, apart from other considerations, it was not entitled to filing and its rejection could not be considered an abuse of discretion.

We, therefore, submit that appellants have failed to show, under their point IV, any error in the action of the court below.

ADDENDA.

We have thus followed step by step the argument presented on behalf of the appellants. There remain, however, two or three matters worthy of comment to round out our treatment of the subject.

The Excuse of Defendants for Failure to Answer.

It is suggested on page 21 of the brief for appellants that "defendants' failure to answer within the time fixed * * * was due to a very natural and excusable misunderstanding of the situation by their then attorney." We think it was rather due to the failure of their attorney to *pay due attention* to the situation. Let us see what the record shows.

The order *pro confesso* was entered on the 11th day of *July*, 1912. No attempt was made to vacate it until *November 7* following and no papers filed therefor until *November 8*. The petition then filed (page 8) asked that it be vacated for two purposes: to permit the refiling of the demurrer and plea, which had been already overruled, and to permit the filing of an answer.

As to the first object, it need only be said that the filing of a demurrer *with* a plea (both to the whole bill) would be fruitless as to the demurrer, because it would be immediately overruled by the filing of the plea (Story's Eq. Pl., secs. 442, 465; Bates' Fed. Eq. Pr., sec. 207; Farley *vs.* Kitson, 120 U. S., 315), and if the plea proposed were insufficient on its face, as we think we have hereinbefore shown, the refiling could only result in another order overruling them. Moreover, if the first order overruling them was erroneous, appellants will now obtain the benefit of that error on the review of that order.

As to the second object, the petition states that "respondents herein now do tender their answer" and "have a just

and meritorious defense," yet no answer was tendered until the day of the hearing, three weeks later, and we think we have shown that it did not contain such a defense. The only excuse suggested for the five months' delay was that "the court, prior to the departure of the judge thereof to the United States, was busily engaged in various important matters." No specification as to how much of the time the judge was absent nor that, because of being "busily engaged," he had refused to hear counsel in this matter, nor that counsel had ever asked to be heard.

This petition, not itself sworn to, was supported by an affidavit of counsel (pages 9-12) which was stated to contain "the reasons more fully specified" for the delay in filing their answer, which may warrant a word of comment.

The first of these reasons referred to an unsuccessful search by counsel for a certain bankruptcy record in some insular court from which he had apparently *hoped* to show payment. But no statement is made that he had any knowledge or information that it *would* show it, and it was admitted that no such record could be found. Had these allegations been made in an application presented *before* the period allowed for answering had expired it might have appealed to the discretion of the court to grant an extension, but it showed no excuse for allowing the time to expire, and then five months additional, before *making the application*, nor that any benefit to defendants would accrue from granting it.

The second reason related to an alleged oral request for an extension of time made during a conversation with the judge two days before the expiration of the time limited, the result of which was alleged to be that the judge said "he would speak to" opposing counsel about it, but it is not claimed that affiant took the trouble to ascertain whether the judge had so spoken or whether opposing counsel had consented, but asserts that counsel "having brought to the attention of the court the fact that he desired an extension * * * felt as if no formal petition was necessary." We

submit that it is not due diligence for counsel thus to impose upon the court the burden of soliciting stipulations, and the fact that this petition, with such an allegation as a basis, was heard and decided by the same judge with whom the conversation was alleged to have been held indicates either that the judge had a different recollection of its purport or considered that counsel had abandoned his effort by not taking some further step. And, again, there is no suggestion of an excuse for ignoring the situation for five months.

Counsel for appellees desire the court to note that there is no claim that the alleged request of counsel for defendants, or of any such desire on his part, was in fact communicated to or came to the knowledge of opposing counsel until the filing of this affidavit in court.

The affidavit repeats with some elaboration the statement of the petition as to the delay being caused by the absence of the judge and other occupations of the court, but it is no more definite than the petition itself, upon which we have already commented. Certainly whatever slight force those circumstances might have as excusing delay in bringing the petition on for *hearing*, they present no shadow of excuse for five months' delay in *filing* it.

The remainder of the affidavit is taken up with matters relating to the merits of the proposed defense, all of which were repeated in the proposed answer which we have already commented upon, so is not material to the question of excuse for delay, and we submit that the excuse attempted was wholly insufficient.

The Denial of the Motion to Suspend Entry of Decree.

It is suggested on page 21 of the brief for appellants that this ruling "worked grave injustice to the defendants" because Judge Hamilton succeeded Judge Charlton and found in favor of the defendants against the interveners. But who can foresee the future? Many a litigant has suffered from

a change of judges, and *vice versa*. This court is not to determine a question of abuse of discretion by subsequent history or results. The sole question is, have appellants shown that *at the time he acted* such circumstances were presented *to him* as made his action denying their motion an *abuse of discretion*.

The motion (page 23) was filed on the very day the final decree was entered, and it recites that "counsel for complainants *has filed* herein a draft of a final decree." We submit that it was presented unreasonably late; that it contains nothing except an appeal to the court's discretion—a recognition that its granting or refusal was within reasonable discretion—and that this court is not in a position to pass upon its exercise because the subject-matter of the intervention is not contained in this record. We have apart Judge Hamilton's opinion of what questions were involved, but that cannot supply the information which would enable this court to determine for itself whether that was "a lien of the same nature." The petition was not sworn to—as presented in the court below it needed no oath, because it was based upon a record there before that court—but, supported by neither oath nor record here, we believe this court will not attempt to review the exercise of discretion by the court below.

Judge Hamilton's Opinion.

Counsel for appellants consider the opinion of Judge Hamilton, rendered upon a petition of intervention heard after this appeal was taken, of sufficient importance to append to their brief as an exhibit. It must therefore be worthy of some comment, although the question of its correctness cannot be brought directly before this court until our appeal therefrom is heard.

We think, however, that counsel have overestimated the extent both of its possible influence upon this court in the present hearing and of its applicability in their favor upon

the questions of law presented. Indeed, even if its applicability be admitted, the principles involved are decided evenly—two for each side. That is to say, we think Judge Hamilton asserts the following propositions:

1st. The contract is a *refaccion* contract.

2d. It gave a tacit lien upon the realty.

3d. That lien bound only the interest of Gallardo in the land and the extent of that interest did not appear.

4th. The lien could not in any event be enforced because it had become barred by prescription, as the recognition was "too general."

If the third and fourth propositions are erroneous, the first and second would establish the right of appellees to an affirmance of the decree below. Let us see if we have correctly stated the substance of Judge Hamilton's opinion.

1. *Held to be a refaccion contract.*

The direct discussion of this question begins with the paragraph of the opinion numbered 1 (page 24, bottom). No positive conclusion is stated in direct terms, but the whole trend of the discussion is toward the affirmative of the proposition. But subsequently his intent is made plain. For instance, in paragraph 3, near the bottom of page 27, he says, in speaking of the *extent* of the lien—

> "the more especially where, as in *this case*, the party *making the refaccion contract* was the owner of only an undivided interest in the land."

And again in paragraph 6, on page 30, he says:

> "It is true that the contract under the foregoing views was not a mortgage *except to the extent* of the undivided interest in the property."

Thus it is clear that the opinion recognizes the instrument as a *refaccion contract* so far as its *character is concerned.*

2. *Held to give a tacit lien upon the realty.*

This question is especially discussed in paragraphs 2 and 3 of the opinion, and the quotation from the Supreme Court of Spain, 63 Jur. Civ., 837, is evidently taken as settling it; but he thought such a lien should not extend beyond the interest in the land of the party contracting, so he concludes in paragraph 3 (page 27, bottom):

> "It is true that he was in control of the whole property, but the *lien* recitals *should* probably *be limited to the interest which he had*, that is to say, ownership as to an undivided interest and leasehold as to the rest."

The same statement in substance is made in the sentence above quoted from paragraph 6.

So he held in effect that, if Ruiz Gandia had been the sole owner of the plantation, the tacit lien would have covered the whole.

If the two propositions above stated are fairly to be deduced from the opinion of Judge Hamilton, as we believe an analysis of that opinion has shown, and those propositions are correct in law, then it is not difficult to demonstrate the error in his two remaining propositions:

3. *The lien bound only the interest of Gandia, and the extent of that interest did not appear.*

The error involved in the holding that the lien, if one of refaccion, bound only the interest of Gandia has been already demonstrated in our brief in two ways: First, under the settled decisions of the Supreme Court of Spain that such a lien bound the land, no matter what the form of the con-

tract or the interest of the parties to it (*supra*, point II), and second, because of the assumption of that lien and the estoppel to deny it (*supra*, point I (*c*). Moreover, whether erroneous or not upon an issue joined as was done on the intervention before Judge Hamilton, it would have been erroneous so to decree in the case now before this court because of the *pro confesso* entered upon the bill which sufficiently alleged that the lien bound the land as against the appellants (*supra*, point 1 (*b*). We are content to rest this question upon the arguments referred to.

Judge Hamilton does not make clear whether, after finding that the lien bound the *interest of Ruiz Gandia*, he would have denied relief to intervenors as to that interest because the amount of the interest was not alleged, since his conclusion that the whole debt was barred by prescription rendered a decision of the other question unnecessary. It is clear, however, under the authorities that, had the absence of an allegation of the *extent of Ruiz' undivided interest* been the only obstacle to giving the intervenors relief to that extent, they should have been allowed opportunity to produce evidence on that point; and likewise, in the case at bar, if it were not cured by the *pro confesso*, this court should remit it to the court below for that purpose alone.

Jones *vs.* Meehan, 175 U. S., 1, 229.

But of course that question is material only in the event this court should hold the lien confined as against these appellants to the interest of Ruiz Gandia.

4. *Held barred by prescription.*

This is the real ground of Judge Hamilton's decision. We submit that the error of his conclusion in this respect has been conclusively demonstrated in our brief under point III, *supra*, and we have no desire to repeat or add to that argument, all of which was as applicable to the intervention before Judge Hamilton as it is to the case at bar.

We do, however, wish to advert for a moment to the fact that Judge Hamilton in his opinion wholly ignores the recognition and estoppel arising from Gallardo's action in the *obtaining and recording of his possessory title,* which was the recognition alleged to have occurred in *1882* (Rec., p. 2), and confines his attention entirely to the supposed recognition in the "acquittance" of *1883* (Opinion, par. 7, page 30). While we believe, and have supported our belief, that both of these constitute sufficient recognitions (*supra,* point I, (*c*), and point IV (2), we feel that, had Judge Hamilton given due consideration to the recognition involved in Gallardo's course of action consummated by the record of his possessory title, he could not have included it in his description of that contained in the "acquittance" as "too general to amount to an express recognition."

If, then, we have shown that Judge Hamilton was in error on this one point of sustaining the defense of prescription, it must follow that he should have vacated the submission of the case and given complainants an opportunity to specify in their bill, if necessary, the extent of Ruiz's interest in the plantation and to prove the same, and then should have given them relief at least to the extent of that interest—and to the extent of the whole property in case he was in error as to limiting it to the Ruiz interest.

In this respect, however, there is a difference between the record in the intervention and in the case at bar, which we are entitled to have the court bear in mind. We have already adverted to the fact that in the case at bar the question of prescription was raised by *plea only,* being omitted from the answer tendered after the *pro confesso;* while it appears from Judge Hamilton's opinion (page 24) that "several defenses are set up to the bill, among them that the instrument in question was not a mortgage of the land, that the claim *has prescribed,* and has been paid." So that, while Judge Hamilton appears to have been entitled to consider the applicability of prescription generally, this court, on the

present appeal, is limited to the inquiry, Was the *plea of prescription* properly overruled?

In another respect, also, as hereinbefore suggested, a difference should be noted between the state of the record in the intervention decided by Judge Hamilton and that in the case at bar. In the former, according to the judge's opinion, one of their defenses was based upon the part ownership, or rather the *lack of full ownership,* in Ruiz, while in the case at bar *no such defense was interposed or offered.* If the court will again examine the answer submitted for filing at the hearing of their petition to open the order *pro confesso,* it will be seen that the defense was there planted squarely upon the two propositions that the Noble instrument was not a lien upon the realty at all and that Gallardo had never recognized it as a lien in any respect.

We submit, then, that Judge Hamilton's opinion and conclusions are favorable to the contentions of the present appellees except upon the question of prescription, and that upon that question we have shown him to have been unquestionably in error.

Conclusion.

As a deduction from the foregoing argument and authorities, we state the following propositions:

1. The allegations of our bill entitled us to the relief prayed.

2. The instrument attached to our bill constituted a lien upon the plantation "San José Cacique" by virtue either of the tacit refaccion lien or of the express general mortgage made specific as against that plantation by describing it therein and recording it as an encumbrance thereon.

3. The course of action of Ricardo Gallardo in obtaining and recording his title to the plantation expressly subject to that lien and in executing the "acquittance" of August 10, 1883, recognizing the existence of the same constituted such

an adoption and ratification thereof as prevents his heirs from now denying its effect as such, in accordance with the quoted maxim of the Spanish law *"nadie puede ir en contra de sus propios actos."*

4. Such adoption and ratification further constituted an interruption of the statute of limitations of thirty years and prevented the action for foreclosure from being prescribed; and, whether so or not, no defense of the limitation of thirty years was properly interposed or proffered.

5. The answer proffered for filing was not in proper form and presented no sufficient defense to the action.

The decree appealed from should be affirmed.

Respectfully submitted,

ROBERTO H. TODD,
N. B. K. PETTINGILL,
Counsel for Appellees.

APPENDIX.

November 10, 1848.—Circular of the Governor Captain General Fixing Rules for the Sale of Sugar Plantations Which Do Not Possess the Privilege Granted by the Laws of the Indies.

The lamentable state of decadence to which the commerce of this island for some time past has come for lack of confidence which makes each day more and more difficult the transactions between plantation owners and merchants, together with the mutual aid to which solely the prosperity of this soil may be due, have influenced my mind, compelling me at last to hasten my resolution touching certain modifications, already put in force in the neighboring island of Cuba, which are approved in this island by the opinion of all kinds of interests, of corporations, and even of individuals, in the privilege which the sugar plantations enjoy, adopting them, of course, without prejudice to reporting them to HER MAJESTY for her sovereign approbation.

Keeping in view, then, the reasons expounded by the Royal Audiencia as to the utility of this reform in its honored consultive decision of the third of September, 1846, the learned and competent report of the Superintendent of the Royal Treasury, and the declaration of the Economic Society of Friends of the Country and the Chamber of Commerce of Porto Rico, and lastly, not desiring to depart from the gradual and preparatory manner, so to speak, which was employed in Havana, not ordering the total suppression of the privilege, but granting the faculty of renouncing it, benign and favorable as well as discretionary and voluntary, I have decided to establish, in the use of the extraordinary faculties which Her Majesty has granted me for serious and very urgent cases, as I consider the present one, the following rules:

1st. The owners of plantations or sugar factories shall, from the publication of this circular, possess the free faculty to renounce the privilege which is conceded them by laws 4 and 5, title 14, book 5 of the Recompilation of the Indies.

2d. In order that such renunciation be considered valid and completely effective, it must have been made by a public document.

3d. Any creditor in whose favor the privilege may be renounced, if his debt be not satisfied at its maturity, has the right to levy his execution upon the plantation which has been mortgaged to him in order that, in conformity with the law, it may be sold at public auction as a whole and not in parts, so that it may pass under the control of the execution creditor in the same condition in which it existed at the time of the execution.

4th. The sale having been had, the new possessor shall recognize as his own the debts which the estate had against it. Those who should have contracted with renunciation of the privilege shall be paid as the installments may become due; and, in the opposite case, the respective creditors may issue execution against the new possessors in the same manner provided for in the third paragraph.

5th. If the proceeds of the property at auction should exceed the total amount of the debts against it, the possessor who is dispossessed shall be, in order to receive the excess in such installments as may be agreed upon, considered as a creditor for whose benefit the privilege is renounced.

6th. Those creditors who, at the time of the execution sale of the property, should not have had the privilege renounced in their favor shall continue with the new possessor in the same manner as they were with the former, with respect to the means which the law concedes to them for the collection of their debts.

7th. Every plantation or factory for sugar making which may be established in the future shall have no right to the privilege referred to.

8th. The expenses of issuing execution and of the sale of the property shall be for the account of the execution creditor.

April 11, 1852.—Royal Cedula Granting Privileges to the Sugar Plantations.

Doña Isabel II, by the Grace of God and the Constitution of the Spanish Monarchy Queen of Spain, to the Governors, Captain Generals of the Islands of Cuba and Porto Rico, and the President of their Royal Audiencias:

Know ye that, always solicitous to improve all branches of the public administration in those, my faithful islands, and especially those which may tend toward the development of their agricultural resources, I have a special interest in eliminating the burden which is offered to every kind of business by the privilege granted by the laws of the Indies to the sugar plantations without thereby improving the condition of the plantation owners. To this end and bearing in mind what has on various occasions been represented to me by the authorities of both islands I issued on the 2d instant the following Royal Decree, which has been authenticated by the President of my Council of Ministers, Don Juan Bravo Murillo:

> "Taking into consideration the information furnished me by the President of my Council of Ministers, approved by said Council, and after consultation with the Minister of Ultramar, I decree the following:
>
> "Art. 1. The factories which may be established for the manufacture of sugar in the Islands of Cuba and Porto Rico, after the publication of the Royal Cedula, which may be issued for that purpose, will be subject to the Common Law both in transactions and contracts among those living and in the matter of inheritance whether testate or intestate.

"Art. 2. With respect to existing factories, the procedure will be continued in accordance with the decision of the Board of Authorities, dated July 17, 1848, and in Porto Rico according to the Circular of the Government of its Captain General, dated November 10 of the same year, until on the first day of January, 1865, which is fixed as the limit, all the factories shall pass under the common law, in accordance with what is prescribed in the preceding article for those which may be newly established.

"Art. 3. The decision of the Board of Authorities of the Island of Cuba and the circular of the Government of Porto Rico, which remain in full force and vigor with respect to the factories which now exist until January 1, 1865, when the privilege finally expires, shall be understood as supplemented, while in force, by the following provision:

"The refaccion contracts which may be entered into shall be formally executed as a public document at the end of which, whenever it is fully performed, there shall be placed the proper note of cancellation if the debt should have been paid; and in case it should not there shall be certified the liquidation of the amount which remains unsatisfied, without which requisites the refaccion creditor shall not exercise the privileged action which the law grants them.

"As a consequence the same liquidation shall be made annually of the accounts of those who administer this kind of property, whatever may be the cause from which such administration proceeds.

"Art. 4. Laws 4 and 5, title 14, book 2 of the recompilation of the Indies in so far as they are inconsistent with these provisions are hereby annulled.

"Done at the Palace this 2d day of April, 1852.

"It is rubricated with the Royal Hand.

"President of the Council of Ministers.

"JUAN BRAVO MURILLO.

"And in order that what is contained inserted in my Royal Decree may have punctual compliance, I have resolved to issue this my Royal Cedula with which I charge and command thee that thou dost respect and comply, and cause it to be respected and

complied with, for which purpose make provision that it be published and circulated among whom it may concern since thus it promotes the best public service and is my Royal will. Done in Aranjuez on the 11th of April, 1852—I, the Queen—President of the Council of Ministers, Juan Bravo Muerillo."